IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1221

STATE OF WISCONSIN, Appellant,

v.

NORMA GRACE CONSTANTINEAU, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Jan. 27, 1969 - Complaint filed in the United States District Court for the Eastern District of Wisconsin by Norma Grace Constantineau, Plaintiff, against James W. Grager, Chief of Police, Hartford, Wisconsin, Defendant, asserting two causes of action and requesting a three-judge panel.

Feb. 3, 1969 - Summons returned, having been served on Jan. 31, 1969.

Feb. 13, 1969 - Notice of retainer and appearance by Wickham, Borgelt, Skogstad and Powell, attorneys for defendant.

Feb. 17, 1969 - Stipulation and order extending time to answer.

Feb. 26, 1969 - Order by Chief Judge of the Seventh Circuit designating the members of a three-judge U.S. District Court to hear and determine this case.

Mar. 25, 1969 - Motion of State of Wisconsin to intervene as a defendant in the second cause of action, with proposed answer of applicant for intervention; pre-trial conference held.

Mar. 26, 1969 - Order of United States District Judge John W. Reynolds following pre-trial conference. This order:
(1) granted the motion of the State of Wisconsin to intervene as a party defendant in the second cause of action;
(2) separated the first and second causes of action;
(3) stated that the issue to be decided on the oral motion for judgment on the pleadings of defendants was solely whether secs. 176.26 and 176.28 (1), Wis. Stats., were constitutional on their face.

Apr. 4, 1969 - Answer of defendant James W. Grager to second cause of action.

June 6, 1969 - Hearing held on defendant's motion for judgment on the pleadings.

Aug. 19, 1969 - Opinion holding secs. 176.26 and 176.28 (1), Wis. Stats., unconstitutional on their face. U. S. Senior Circuit Judge F. Ryan Duffy files dissenting opinion.

Nov. 25, 1969 - Order enjoining defendants from enforcing the provisions of secs. 176.26 and 176.28, Wis. Stats.

Dec. 24, 1969 - Notice of appeal filed by State of Wisconsin to the Supreme Court of the United States from Order of Nov. 25, 1969.

Jan. 8, 1970 - Affidavit of Benjamin Southwick concerning hearing of Jun. 6, 1969.

Feb. 18, 1970 - Transcript (pp. 1 - 33) of Jun. 6, 1969 hearing filed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

69-C-29

NORMA GRACE CONSTANTINEAU, Plaintiff

v.

JAMES W. GRAGER, Chief of Police,
Hartford, Wisconsin, Defendant

COMPLAINT

Filed Jan. 27, 1969

FIRST CAUSE OF ACTION

1. Jurisdiction herein is founded on 42 U.S.C. 1983 and 28 U.S.C. 1343(3).

2. That plaintiff is an adult residing at 580 Lake, Hartford Wisconsin and is a citizen of the United States of American and of the State of Wisconsin.

3. That defendant is the Chief of Police of Hartford Wisconsin and who, at all times mentioned herein, acted pursuant to sec. 176.26 and 176.28(1) of the Wisconsin Statutes, and under color of law, custom and usage of the State of Wisconsin.

4. That heretofore, to wit, on Jan. 23, 1969 defendant, in his capacity of Chief of Police of the City of Hartford, Wisconsin, and acting under color of law, custom and usage of the State of Wisconsin and City of Hartford, and in bad faith and arbitrarily, issued a decree signed by him, a copy of which is attached hereto, wherein he ordered and ruled that plaintiff herein, an adult, could no longer have the right and privelege to purchase alchololic beverages in the City of Hartford; that thereafter, defendant wilfully, maliciously and wantonly caused said decree to be published, circulated and served on various persons throughout the City of Hartford in the form of a "Notice", identifying plaintiff herein as the person to whom the sale or transfer to of alchoholic beverages was forbidden for a period of one year following Jan. 23, 1969.

5. That the said acts of defendant pursuant to said statutes and under the color, custom and usage of the State of Wisconsin and the City of Hartford, as used and enforced against the plaintiff by the defendant have deprived plaintiff of her liberty to purchase and receive alchoholic beverages, which now is and has always been an acknowledged and accepted right of every citizen of the State of Wisconsin and of the United States of America.

6. That the said statutes as so enforced by defendant against plaintiff are unconstitutional for the following reasons:

a. They deprive plaintiff of her liberty without due process of law in violation of the 14th amendment of the Constitution of the United States.

b. They violate the procedural due process guarantees of the 14th amendment of the United States Constitution by permitting defendant to arbitrarily grant, limit or refuse to plaintiff the right of plaintiff to purchase and receive alchoholic beverages without according plaintiff the right to a hearing or notice prior to said action on behalf of defendant.

c. They violate the due process requirements and guarantees of the 14th amendment of the Constitution of the United States by transferring judicial powers to ministerial and legislative officials.

d. They are vague and overly broad and incapable of proper application by their not containing definite standards or guidelines.

e. They deprive plaintiff of the equal protection of the laws and discriminate against her in violation of the equal protection clause of the Constitution of the United States.

d. They deprive plaintiff of her right to privacy guaranteed to her by the 9th amendment and the due process clause of he 14th amendment of the Constitution of the United States.

e. They deprive plaintiff of her priveleges and immunities guaranteed to her as a United States Citizen by the Constitution of the United States.

7. That the decree and order of defendant, made under color, custom and usage of the laws of Wisconsin and Hartford, as so published, circulated and served throughout the City of Hartford is contrary to and violative of the federally protected constitutional rights of plaintiff as guaranteed her

by the first, fifth, ninth and fourteenth amendments to the Constitution of the United States, and has caused her great, clear and immediate injury to her mind, person and reputation; that plaintiff verily believes that such injury to her mind, person and reputation will continue indefinitely in the future and that she has suffered and endured humiliation, embarassment and injury and verily believes that such will continue indefinitely in the future, all to her damage in the sum of one hundred thousand ($100,000) dollars compensatory damages and an additional one hundred thousand ($100,000) dollars punitative damages.

SECOND CAUSE OF ACTION

8. Plaintiff realleges allegations (2) through (6) of the first cause of action.

9. Jurisdiction is herein founded under sec. 28 U.S.C. 2281.

10. That the decree and order *of defendant* as chief of police of Hartford, Wisconsin, made under color of law, custom and usage of the State of Wisconsin and City of Hartford is contrary to and violative of the federally protected constitutional rights, privileges and immunities of plaintiff and has caused plaintiff great, clear and immediate and irreparable injury and will continue to cause plaintiff great, clear and immediate and irreparable injury if the defendant is not restrained from continuing in his wrongful conduct.

11. That the injury plaintiff has suffered and continues to suffer and which she will suffer in the future cannot be adequately redressed in an action at law, there being no remedy at law for the wrongs of defendant.

WHEREFORE for the first cause of action, plaintiff demands judgment against defendant for $100,000 compensatory

damages and an additional $100,000 punitative damages plus costs.

WHEREFORE for the second cause of action plaintiff demands judgment as follows:

1. For a ruling by a 3 Judge Court declaring secs. 176.26 and sec. 176.28(1) unconstitutional.
2. For a permanent injunction restraining defendant from serving publishing and circulation notices ordering all persons served not to sell or transfer to plaintiff any alchoholic beverages.
3. For the convening of a 3 Judge Court to consider said matters.

(161 W.Wis.Ave. Milw.)

/s/ S. A. SCHAPIRO
S. A. SCHAPIRO, Attorney for
Plaintiff

NOTICE

NOTICE IS HEREBY GIVEN, To all parties concerned, that you, and each of you are hereby forbidden to sell or give away to GRACE NORMA CONSTANTINEAU, any intoxicating liquors of whatsoever kind for a period of one year from date, under pain of the penalties provided by Sections 176.26 and 176.28(1) of the Wisconsin Statutes.

176.28–Sale to forbidden person; evidence; pleading. (1) When the sale or giving away of any intoxicating liquors or fermented malt beverages to any person shall have been forbidden in the manner provided by law, every person who shall sell or give to, or for or purchase or procure for, or in behalf of, such prohibited person any such intoxicating liquors or fermented malt beverages, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding $250

and the costs of prosecution, and in default of immediate payment thereof he shall be committed to the county jail or house of correction not less than 60 days unless sooner discharged by the payment of such fine and costs.

Dated at *Hartford*, Wisconsin, this *23rd* day of *January*, 1969.

/s/ James W. Grager
Chief of Police

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

69-C-29

NORMA GRACE CONSTANTINEAU, Plaintiff

v.

JAMES W. GRAGER, Chief of Police,
Hartford, Wisconsin, Defendant

STATE OF WISCONSIN,
Applicant for Intervention

MOTION TO INTERVENE AS A DEFENDANT

Filed Mar. 25, 1969

The State of Wisconsin, by Robert W. Warren, Attorney General and Benjamin Southwick, Assistant Attorney General, its attorneys, moves this court for an order permitting it to intervene herein and become a party herein on the ground that the representation of the applicant's interest in upholding the constitutionality of its statutes, sections 176.26 and 176.28 (1), Wisconsin Statutes, by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action. A copy of the proposed answer of the State of Wisconsin is attached hereto.

Dated March 25, 1969.

ROBERT W. WARREN
Attorney General

BENJAMIN SOUTHWICK
Assistant Attorney General

Attorneys for Applicant
For Intervention

Department of Justice
State Capitol
Madison, Wisconsin

PROPOSED ANSWER OF APPLICANT FOR INTERVENTION

Now comes the applicant for intervention State of Wisconsin, by Robert W. Warren, Attorney General, and Benjamin Southwick, Assistant Attorney General, by way of answer to plaintiff's complaint, and alleges and shows to the Court as follows:

1. Applicant for intervention states that it has no knowledge or information sufficient to form a belief as to the truth of the averment in plaintiff's complaint that defendant James W. Grager acted pursuant to or enforced sections 176.26 and 176.28 (1), Wisconsin Statutes.

2. Applicant for intervention denies that the liberty to purchase and receive alcoholic beverages is now and always has been an acknowledged and accepted right of every citizen of the State of Wisconsin and of the United States of America.

3. Applicant for intervention denies that sections 176.26 and 176.28 (1), Wisconsin Statutes, are unconstitutional.

4. Applicant for intervention denies that the injuries plaintiff has suffered and will continue to suffer in the future, if any, cannot be adequately redressed in an action at law or that there is no remedy at law for the wrongs, if any, of the defendant.

5. Applicant for intervention denies that 28 U.S.C. 2281 is applicable to the facts as alleged by the plaintiff.

6. Except as noted above, applicant for intervention states that it has no knowledge or information sufficient to form a belief as to the truth of plaintiff's complaint.

7. For a first, separate and distinct defense, applicant for intervention alleges that the court lacks jurisdiction under 28 U.S.C. 2281 over the subject matter of the complaint on the ground that it fails to raise a substantial constitutional question requiring the convening of a three-judge district court; because in substance plaintiff attacks only the application of sections 176.26 and 176.28 (1) to the facts in question; because plaintiff's claim could properly and adequately be determined in State court.

8. For a second, separate and distinct defense applicant for intervention alleges that plaintiff's complaint fails to state a claim upon which relief can be granted under 28 U.S.C. 2281 on the ground that it fails to raise a substantial constitutional question requiring the convening of a three-judge district court; because in substance plaintiff attacks only the application of sections 176.26 and 176.28 (1) to the facts in question; because plaintiff's claim could properly and adequately be determined in State court.

9. For a third, separate and distinct defense applicant for intervention alleges that the second cause of action must be separated from the first cause of action on the ground that jurisdiction of the first cause of action is not grounded in 28

U.S.C. 2281; that the court lacks jurisdiction under 28 U.S.C. 2281 of the subject matter of the first cause of action of plaintiff's complaint.

WHEREFORE applicant for intervention demands judgment dismissing plaintiff's complaint insofar as it seeks to have sections 176.26 and 176.28 (1) Wisconsin Statutes found unconstitutional; separating plaintiff's first cause of action from plaintiff's second cause of action.

Dated March 25, 1969.

ROBERT W. WARREN
Attorney General

/s/ Benjamin Southwick
BENJAMIN SOUTHWICK
Assistant Attorney General

Attorneys for Applicant
For Intervention

Department of Justice
State Capitol
Madison, Wisconsin

TRANSCRIPT OF PROCEEDINGS

Filed Feb. 18, 1970

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

69-C-29

NORMA GRACE CONSTANTINEAU, Plaintiff

v.

JAMES W. GRAGER, Chief of Police,
Hartford, Wisconsin, Defendant

Transcript of proceedings had in the above-entitled matter before a Three-Judge Court, The Honorable F. Ryan Duffy, The Honorable John W. Reynolds, and The Honorable Myron Gordon, on the 6th day of June, 1969, commencing at 2:00 o'clock p.m.

Appearances:

S. A. Schapiro, Esq., appeared on behalf of the Plaintiff;

Benjamin Southwick, Esq., Assistant Attorney General, appeared on behalf of Defendants Grager and State of Wisconsin;

Richard T. Becker, Esq., appeared on behalf of Defendant Grager on second cause of action;

Edmund W. Powell, Esq., appeared on behalf of Defendant Grager on first cause of action.

Proceedings.

* * *

Motion to Present Witnesses by Attorney Southwick:

[20] JUDGE DUFFY: Very well.

Who desires to speak first?

You have about five minutes of your time for rebuttal.

MR. SOUTHWICK: With the leave of the Court, I would like to call a witness, if that is possible. I am not entirely familiar with the procedure here. Can I present facts by calling a witness.

JUDGE DUFFY: Very seldom. I have been in many three-judge courts, I don't think I have ever sat on one where it's been done, but I assume there are situations that arise where it could be done.

JUDGE REYNOLDS: It is my understanding in the order following the pre-trial, the issue was whether or not this Statute was on the face of the Constitution or not. And for the purposes of this hearing, the State accepted all the allegations as true.

MR. SOUTHWICK: I think there are some facts to be presented which would be relevant to the Constitutional question.

JUDGE DUFFY: Your motion to present a witness at this time in view of the stipulation at the pre-trial hearing and so forth will be denied. You may proceed.

* * * * * * * * *

Discussion Between United States District Judge Reynolds and Attorney Southwick:

JUDGE REYNOLDS: Doesn't this also hold a man up to ridicule in a community? I think to be posted in every saloon in your home town, if your wife wanted – if she got mad at you, she could post you over the City of Madison. You live in Madison?

MR. SOUTHWICK: Yes.

JUDGE REYNOLDS: In every city saloon in Madison, she could have your name on the wall. That wouldn't help your law business, if you are in private practice. It seems like an awful lot of power to give the wife. I am all for wives, but –

MR. SOUTHWICK: The Attorney General pointed out in his brief, I think, the party posted would have some recourse.

JUDGE REYNOLDS: What recourse?

MR. SOUTHWICK: Attempting to get a writ of certiorari would be one, or have a damage action at law.

JUDGE REYNOLDS: I don't think I am as much concerned about whether or not you can get a drink, go from Hartford to Hartland or some other community, but the fact of being held up to ridicule for reasons which the party may not have any – may not know why. I think this is the right which has not been mentioned which bothers me more than –
[25] because even during prohibition, everyone could get a drink, so that's not the problem.

MR. SOUTHWICK: Well, if we look at the cases cited in the Attorney General's brief, for instance, –

JUDGE REYNOLDS: I want your personal opinion. Does that seem fair to you?

MR. SOUTHWICK: It seems fair to me. I think the requirements of due process have been met, Your Honor.

JUDGE REYNOLDS: Okay.

MR. SOUTHWICK: As I was speaking, I think historically the so-called right of a person to purchase and consume alcoholic beverages has been a frail right and a right which has been extremely vulnerable to the State's powers to regulate it. And secondly, I think we should look not only to the nature of the right of Plaintiff in this action, but also to the alternatives available to the Plaintiff here.

Now, the Plaintiff has been posted within the City of Hartford, but there's been – I think it's an admitted fact that the Plaintiff has been drinking outside the City of Hartford since January 23rd, 1969, on the date when she was posted. And I have been led to believe that the Plaintiff is not even a resident of the City of Hartford, so I don't see that this is an action taken by the Defendant here is going to have impaired

6] greatly her right to consume alcoholic beverages. She has the whole universe to purchase alcoholic beverages outside the City of Hartford, and even the area where she lives. So I think if we apply the test which I think is the proper test to determine whether the requirements of due process have been met here and if we look at cases which the Attorney General cited in his brief where rights have been taken away without a hearing and where the withdrawals have been challenged on a due process challenge and look at the nature of the rights and many of them are economic rights, and we look at the application of the tests sent forth in Joint Anti-Fascist League and Cafeteria Workers versus McElroy, and we look at these cases, I think the Court is -- the inevitable conclusion arises that the requirements of due process have been met in this case.

* * * * * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

69-C-29

NORMA GRACE CONSTANTINEAU, Plaintiff

v.

JAMES W. GRAGER, Chief of Police, Hartford, Wisconsin, and STATE OF WISCONSIN, Defendants

OPINION AND ORDER

Filed Aug. 19, 1969

Before DUFFY, Circuit Judge, and REYNOLDS and GORDON, District Judges.

REYNOLDS, District Judge. The complaint herein, brought pursuant to § 1983 of Title 42 and § 2281 of Title 28

of the United States Code of Laws, challenges the constitutionality of § § 176.26 and 176.28 (1) of the Wisconsin Statutes. The basis of the alleged invalidity is the claim that these State statutes have and are depriving the plaintiff of due process of law in violation of the fourteenth amendment to the United States Constitution.

The first cause of action seeks damages, and the second seeks injunctive relief. At a pretrial conference held on March 25, 1969, it was agreed that the two causes of action would be separated, and the second cause of action would be decided first. Following an oral motion on behalf of the defendants for judgment on the pleadings in respect to the second cause of action, it was further agreed that the sole issue for determination of the defendant's motion is whether the Wisconsin Statutes in question are on their face constitutional. A hearing limited to this issue was held on June 6, 1969.

FACTS

For the purposes of this motion, the facts as alleged in the pleadings will be regarded as true. The plaintiff, Norma Grace Constantineau, is an adult resident of the City of Hartford, Wisconsin. The defendant, James W. Grager, is the Chief of Police of the City of Hartford, Wisconsin.

On January 23, 1969, defendant Grager, in his capacity as Chief of Police and acting pursuant to § § 176.26 and 176.28 (1) of the Wisconsin Statutes, posted a notice in the retail liquor outlets in the City of Hartford, Wisconsin. This notice informed the person or establishment notified that they were forbidden "to sell or to give away to Norma Grace Constantineau any intoxicating liquors of whatever kind for a period of one year from date, under pain of the penalties provided by Sections 176.26 and 176.28 (1) of the Wisconsin Statutes."

This notice was signed by the defendant, James W. Grager, as Chief of Police on January 23, 1969.

It is uncontested that the plaintiff received no notice or hearing whatsoever prior to this posting, and that as a result of this posting she has been unable to purchase intoxicating liquors within the City of Hartford, Wisconsin.

STATUTES INVOLVED

The statutes pursuant to which the defendant Grager acted provide as follows:

"176.26 Liquor; beer and ale; sale forbidden; to whom. (1) When any person shall by excessive drinking of intoxicating liquors, or fermented malt beverages misspend, waste or lessen his estate so as to expose himself or family to want, or the town, city, village or county to which he belongs to liability for the support of himself or family, or so as thereby to injure his health, endanger the loss thereof, or to endanger the personal safety and comfort of his family or any member thereof, or the safety of any other person, or the security of the property of any other person, or when any person shall, on account of the use of intoxicating liquors or fermented malt beverages, become dangerous to the peace of any community, the wife of such person, the supervisors of such town, the mayor, chief of police or aldermen of such city, the trustees of such village, the county superintendent of the poor of such county, the chairman of the county board of supervisors of such county, the district attorney of such county or any of them, may, in writing signed by her, him or them, forbid all persons knowingly to sell or give away to such person any intoxicating liquors or fermented malt beverages, for the space of one year and in like manner may forbid the selling, furnishing, or giving away of any such liquors or fermented malt beverages, knowingly to such person by any person in any town, city or village to which such person may resort for the same. A copy of said writing so signed shall be personally served upon the

person so intended to be prohibited from obtaining any such liquor or beverage.

"(2) And the wife of such person, the supervisors of any town, the aldermen of any city, the trustees of any village, the county superintendent of the poor of such county, the mayor of any city, the chairman of the county board of supervisors of such county, the district attorney or sheriff of such county, may, by a notice made and signed as aforesaid, in like manner forbid all persons in such town, city or village, to sell or give away intoxicating liquors or drinks or fermented malt beverages to any person given to the excessive use of such liquors, drinks or beverages, specifying such person, and such notice shall have the same force and effect when such specified person is a nonresident as is herein provided when such specified person is a resident of said town, city or village."

"176.28 Sale to forbidden person; evidence; pleading. (1) When the sale or giving away of any intoxicating liquors or fermented malt beverages to any person shall have been forbidden in the manner provided by law, every person who shall sell or give to, or for, or purchase or procure for, or in behalf of, such prohibited person any such intoxicating liquors or fermented malt beverages, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding $250 and the costs of prosecution; and in default of immediate payment thereof he shall be committed to the county jail or house of correction not less than 60 days unless sooner discharged by the payment of such fine and costs."

ARE THE STATUTES ON THEIR FACE UNCONSTITUTIONAL?

The issue before this court is not whether a State may regulate the sale or gift of liquor to persons who by their excessive drinking misspend their funds so as to expose themselves or their families to want or their communities to liability for the support of themselves or their families or endanger

their own health or the peace and welfare of their communities. The power of a State to regulate the purchase, sale, or gift of intoxicating liquors within its borders is well established. Because of the well-recognized noxious qualities of such liquors and the potential extraordinary evil which may result from their misuse, this police power has been held to encompass absolute prohibition as well as severe restriction. *Ziffrin v. Reeves,* 308 U.S. 132 (1939); *Crane v. Campbell,* 245 U.S. 304 (1917). Rather the issue raised by this cause of action of the complaint is whether these particular statutes, enacted for an admittedly legitimate State objective, are nonetheless unconstitutional because in reaching that objective they violate the constitutional rights of individuals who are "posted."

It is the opinion of this court that § § 176.26 and 176.28 (1) of the Wisconsin Statutes are on their face unconstitutional in that they violate the procedural due process requirements of the fourteenth amendment to the United States Constitution. The concept of procedural due process is an elusive concept, the exact meaning of which varies with the particular factual context. As stated in *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,* 367 U.S. 886, 895 (1961) –

> " * * * consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. * * *"

In the instant case, the private interest affected by the statutes is not only the ability of the plaintiff to purchase alcoholic beverages within the City of Hartford, but also the interest of the plaintiff in not being exposed to unfounded public defamation, embarrassment, and ridicule. On the other

hand, the governmental interest involved is the function of the State in regulating the sale of alcoholic beverages so as to prevent the dangers to individuals and the public that stem from their excessive use.

It is the defendants' position that having delineated the relative interests involved, procedural due process in the given situation does not require notice and hearing prior to "posting." They contend that when one weighs the police power of the State to control intoxicating liquors with the interest of the plaintiff in this case, the balance is clearly struck in favor of the former. With this conclusion we cannot agree.

In "posting" an individual, the particular city official or spouse is doing more than denying him the ability to purchase alcoholic beverages within the city limits. In essence, he is giving notice to the public that he has found the particular individual's behavior to fall within one of the categories enumerated in the statutes. It would be naive not to recognize that such "posting" or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State statute can make such a quasi-judicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter.

At the very minimum, due process requires that a person about to be "posted" be given an opportunity to answer the allegation that his behavior brings him within one of the categories set forth in the statutes. The statutes, however, include no provision whatsoever for either notice or hearing prior to "posting," and for this reason it is our opinion that they are unconstitutional on their face.

In ruling that a person about to be "posted" is entitled to an opportunity to be heard, we do not mean that he is entitled to a full hearing with all of the constitutional ramifications thereof. Such a person is entitled, however, to an opportunity to confront the person claiming that his conduct warrants his being "posted" and to present his side of the story before he is in fact "posted."

The statutes involved also present serious constitutional questions with regard to the scope of persons to whom the "posting" is delegated as well as the definitiveness of the grounds for which an individual can be posted. However, having found that the statutes are unconstitutional as violative of due process, we do not find it necessary to reach these additional issues.

For the foregoing reason, it is the opinion of this Court that § § 176.26 and 176.28 (1) of the Wisconsin Statutes are on their face unconstitutional.

Dated at Milwaukee, Wisconsin, this *13th* day of *August*, 1969.

/s/ John W. Reynolds
John W. Reynolds,
U. S. District Judge

/s/ Myron L. Gordon
Myron L. Gordon,
U. S. District Judge

69-C-29

DUFFY, Senior Circuit Judge, dissenting.

I respectfully dissent. I believe my colleagues have failed to give effect to the well-established law that the states of our country possess a very high degree of police power in all matters pertaining to the regulation of intoxicating liquors.

"The power of a state to absolutely prohibit the sale of intoxicating liquor includes the power to permit the sale thereof under definitely prescribed conditions, and such business or traffic may be permitted only under such conditions as will limit to the utmost its evils. Similarly, the power to prohibit absolutely the manufacture of intoxicating liquors includes the power to prohibit conditionally, or to impose reasonable regulations or conditions upon, such manufacture." 30 Am. Jur., Intoxicating Liquors, § § 23, p. 541.

Over fifty years ago the United States Supreme Court recognized that ". . .the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge." *Crane v. Campbell,* 245 U.S. 304, 308 (1917). This statement was specifically approved in *Samuels v. McCurdy,* 267 U.S. 188, in an opinion written by Chief Justice Taft.

In *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, the Supreme Court stated: "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

We should here weigh the nature of the government's functions and powers against the affected right of the individual. We note that plaintiff's attorney, both in his brief and on oral argument, conceded that the right of his client to drink intoxicating liquors is not a right protected by the United States Constitution. In *Rice v. Sioux City Cemetery,* 349 U.S. 70, 72, the Court said: "Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment, can its protection be invoked."

The great police power of the states over intoxicating liquor already existing was increased by the passage of the Twenty-first Amendment to the United States Constitution. That amendment provides in substance: "The transportation or importation into any State or Territory . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." It is thus clear that the Twenty-first Amendment to the federal Constitution bestows on the states broad regulatory power over the liquor traffic. In 48 Corpus Juris Secundum, Intoxicating Liquors, § 33, p. 167, it is stated: "The Twenty-First Amendment to the federal Constitution bestows on the states broad regulatory power over the liquor traffic."

In *Crowley v. Christensen*, 137 U.S. 86, 90-91, the Court stated: "Not only may a license be exacted from the keeper of the saloon . . . but restrictions may be imposed as to the class of persons to whom they may be sold...."

In *Cafeteria Workers v. McElroy, supra,* plaintiff Rachel Brawner was a shortorder cook in a cafeteria operated by her employer on a military base supervised by the defendant Secretary of Defense. She had worked there for six years. Her employer was satisfied with her work. The defendant withdrew her right to enter on the military base which was, of course, a condition necessary for her employment. Plaintiff challenged defendant's action saying that due process required that she be given notice of a hearing before any such action could be taken. The Supreme Court held that defendant's exparte actions met the requirement of due process despite the absence of any notice to the plaintiff or a hearing.

In the *Cafeteria Workers'* case, *supra,* the Court noted that the plaintiff was free to obtain employment as a short order cook with the same employer at another location, saying:

"All that was denied her was the opportunity to work at one isolated and specific military installation." 367 U.S. 896.

Here, it can be stated that while bartenders in Hartford were prohibited from selling intoxicating liquors to the plaintiff, such prohibition was restricted to the city of Hartford and for a period of one year.

In *Parker v. Board of Education of Prince George's County, Md.*, 237 F. Supp. 222 at 228, the Court noted that the plaintiff was denied the right to work in the public schools in one county in Maryland. In *Chafin v. Pratt*, 358 F. 2d, 349 357, the Court noted that plaintiff "was free to work elsewhere."

There is here no claim by plaintiff that the statement prepared by the defendant pursuant to Wisconsin Statutes §176.26 and §176.28 was untrue or unwarranted. There was no effort by the plaintiff to obtain a hearing before the defendant or anyone else.

In view of the unreversed decisions of the United States Supreme Court, I conclude that the requirements of due process are met by Sections 176.26 and 176.28 (1) of the Wisconsin Statutes. If the Supreme Court's decisions are to be disregarded or modified, I think that is the prerogative of the Supreme Court and that it is not the prerogative of a United States District Court.

/s/ F. Ryan Duffy
U. S. Senior Circuit Judge, 7th Cir.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

69-C-29

NORMA GRACE CONSTANTINEAU, Plaintiff

v.

JAMES W. GRAGER, Chief of Police, Hartford, Wisconsin, and STATE OF WISCONSIN, Defendants

ORDER

Filed Nov. 25, 1969

This matter having come before the three-judge district court, hereinbefore convened, for a hearing on the second cause of action alleged in the complaint which challenges the constitutionality of § § 176.26 and 176.28 (1) of the Wisconsin Statutes, and the Court having heard counsel and being fully advised in the premises, and a majority of said court being of the opinion that § § 176.26 and 176.28 (1) of the Wisconsin Statutes are unconstitutional on their face,

IT IS NOW THEREFORE ORDERED that the defendants herein be and they are enjoined from enforcing the provisions of § § 176.26 and 176.28 (1) of the Wisconsin Statutes.

Dated at Milwaukee, Wisconsin, this *25th* day of November, 1969.

/s/ John W. Reynolds
U. S. District Judge

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. ~~1921~~ 95

STATE OF WISCONSIN,
Appellant,

v.

NORMA GRACE CONSTANTINEAU,
Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

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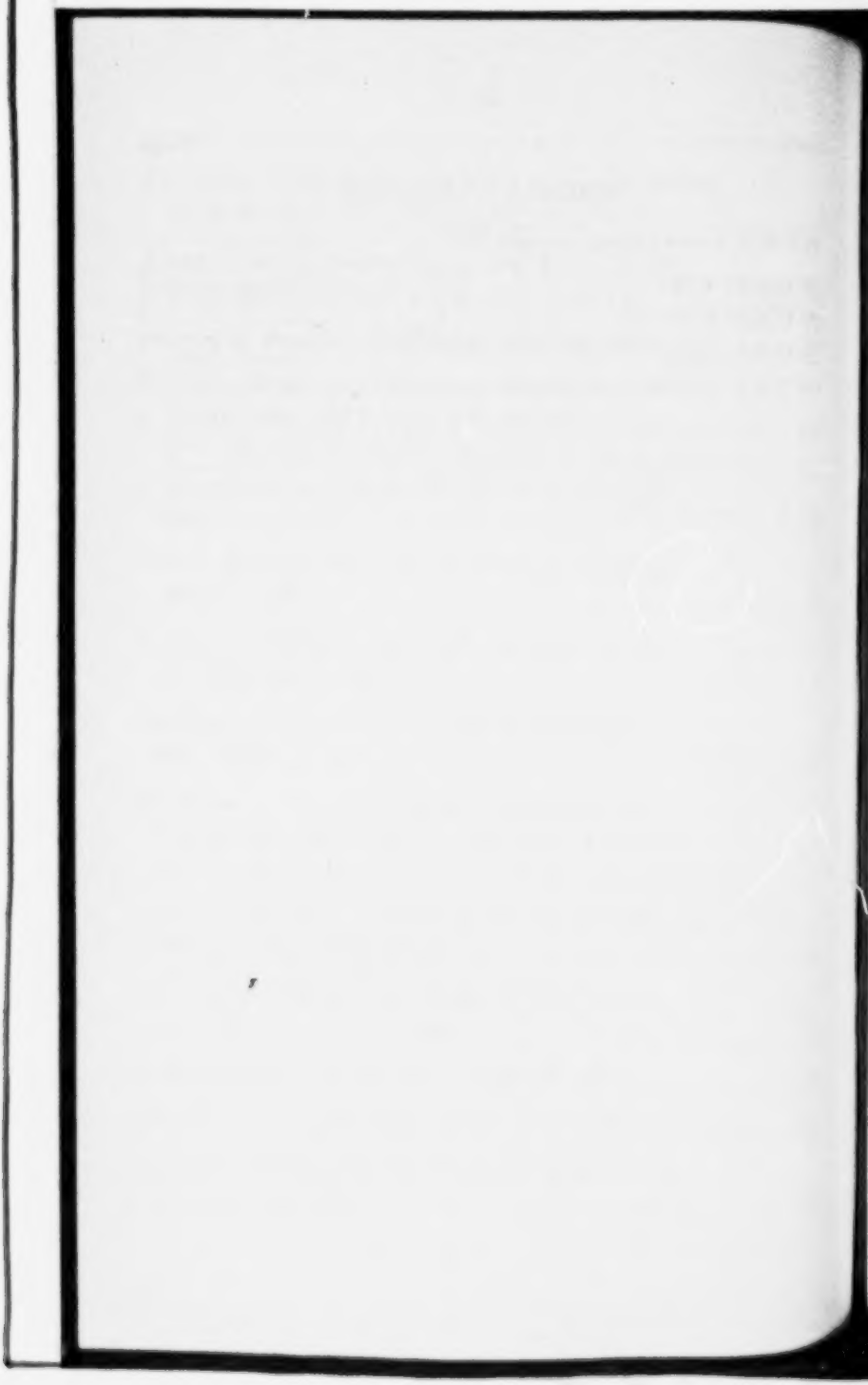

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No.

NORMA GRACE CONSTANTINEAU, Appellee

v.

JAMES W. GRAGER, CHIEF OF POLICE OF HARTFORD, WISCONSIN, Defendant
STATE OF WISCONSIN, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

Appellants appeal from an order of the United States District Court for the Eastern District of Wisconsin (see Appendix B) entered on November 25, 1969, holding secs. 176.26 and 176.28 (1), Wis. Stats., to be unconstitutional on their face and enjoining defendant and appellant from enforcing the provisions of said statutes. Appellant submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The entire opinion, including findings of fact, conclusions of law, and judgment, of the United States District Court for the Eastern District of Wisconsin is reported in 302 F.Supp. 861 (1969) and is set forth hereto as Appendix A.

JURISDICTION

This cause of action was brought under 28 U.S.C. §2281 and §2284 to enjoin the actions of defendant Grager taken pursuant to secs. 176.26 and 176.28 (1), Wis. Stats. The order of the three-judge District Court was entered on November 25, 1969, and notice of appeal was filed in that Court on December 24, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253 and §2101 (b).

QUESTIONS PRESENTED

(1) Do secs. 176.26 and 176.28 (1), Wis. Stats., violate the procedural due process requirement of Amendment Fourteen, Section 1, United States Constitution?

(2) Did the lower court err in refusing to allow appellant to call witnesses and elicit testimony at the hearing on defendant's and appellant's motion for judgment on the pleadings, at which hearing it was agreed that the sole issue for determination was the constitutionality of secs. 176.26 and 176.28 (1), Wis. Stats.?

(3) Did the lower court err in basing its opinion of August 13, 1969, that secs. 176.26 and 176.28 (1), Wis. Stats., were unconstitutional upon an assumption that appellee would be exposed to "unfounded public defamation, embarrassment, and ridicule" by the operation of said Wisconsin Statutes, when no such facts appeared in the record nor were they correct in fact?

STATUTES INVOLVED

Secs. 176.26 and 176.28 (1), Wis. Stats., are involved in this case and are set forth in Appendix *C* hereto.

STATEMENT

Defendant James W. Grager is chief of Police of the City of Hartford, Wisconsin, and he held that position on January 23, 1969. On January 23, 1969, defendant Grager, in his capacity as Chief of Police of the City of Hartford, Wisconsin, and acting pursuant to secs. 176.26 and 176.28 (1), Wis. Stats., posted a notice in all of the retail liquor outlets in the City of Hartford, Wisconsin. A copy of this notice was attached to appellee's complaint. This notice, posted in accordance with secs. 176.26 and 176.28 (1), Wis. Stats., informed the notified persons or establishments that they were forbidden "to sell or give away to [appellee] Norma Grace Constantineau any intoxicating liquors of whatever kind for a period of one year from date, under pain of the penalties provided by secs. 176.26 and 176.28 (1), Wis. Stats." This notice was signed by defendant James W. Grager as Chief of Police of the City of Hartford, Wisconsin, on January 23, 1969. Appellee then effected the personal service of summons and complaint upon defendant James W. Grager on January 27, 1969. The cpmplaint in its first cause of action asserted a claim for damages under 42 U.S.C. 1983 and 28 U.S.C. 1343 (3); the second cause of action called for the convening of a three-judge panel under 28 U.S.C. 2281 and for an injunction on the ground that secs. 176.26 and 176.28 (1), Wis. Stats., were unconstitutional. Defendant Grager answered the first cause of action and moved to separate it from the second cause of action. A pre-trial conference was held on March 25, 1969, before the Honorable John W. Reynolds, United States

District Judge for the Eastern District of Wisconsin. At this pre-trial conference, the State of Wisconsin moved to intervene as a defendant in the second cause of action and to separate the first cause of action from the second. These motions were granted orally by the court at the pre-trial conference. Defendant Grager and Appellant State of Wisconsin then moved for judgment on the pleadings, which motion was held in abeyance. It was then agreed among the parties that the sole issue for determination of the defendant's and appellant's motion for judgment on the pleadings was whether secs. 176.26 and 176.28 (1), Wis. Stats., were on their face constitutional. A hearing before the three-judge panel was held on June 6, 1969. The three-judge Court issued its opinion, United States Senior Circuit Judge F. Ryan Duffy dissenting, on August 13, 1969, holding that the Wisconsin statutes in question were on their face unconstitutional. This opinion is set forth in Appendix A. The Court entered its order on November 25, 1969. This order is set forth in Appendix *B*. Appellant State of Wisconsin filed its notice of appeal on December 24, 1969.

THE QUESTIONS ARE SUBSTANTIAL

Secs. 176.26 and 176.28 (1) of the Wisconsin Statutes, as set forth in Appendix C, vest certain enumerated local officials with the power to "post" other persons as habitual drunkards and to send notice to that effect to anyone within their jurisdiction who might sell or give alcoholic beverages to the "posted" person. Penalties are set forth for those who sell or give away alcoholic beverages to a "posted" person after having received such "posting" notice. Notice and hearing are not provided to the posted person. The issue before

this Court is whether this statuutory scheme, which is found in fifteen states other than WWisconsin (see Appendix E), provides (procedural) due proceess as required by the Fourteenth Amendment to the UUnited States Constitution.

The requirements of proceduural due process vary in any particular circumstance. As thhe Court noted in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L. Ed. 2d 1230 (1961):

> " ' . . . The very naturee of due process negates any concept of inflexible proceddures universally applicable to every imaginable situationn [citing cases]. . . . "[D]ue process" unlike some legal rules, is not a technical conception with a fixed contentt unrelated to time, place and circumstance.' "

To answer the issue beforee this Court, one must weigh the nature of the government function against the private interest affected by that govvernment function. *Cafeteria Workers v. McElroy, supra*, 367 U.S. 895.

Looking at the governmentt function of regulating traffic in intoxicating beverages, Senicior Circuit Judge Duffy stated in his dissenting opinion, beloww, page 7a, Appendix A, that:

> ". . . the well-establishhed law [is] that the states of our country possess a very high degree of police power in all matters pertaining to tthe regulation of intoxicating liquors,"

Senior Circuit Judge Duffy citeed *Crane v. Campbell*, 245 U.S. 304, 308, 38 S.Ct. 98, 99, 62 L.Ed. 304 (1917); *Samuels v. McCurdy*, 267 U.S. 188, 45 S.Ct. 264, 69 L.Ed. 568 (1925); *Crowley v. Christensen*, 137 UU.S. 86, 90-91, 11 S.Ct. 13, 15, 34 L.Ed. 620 (1890), for this proposition. *Lewis v. City of Grand Rapids*, 356 F.2d 276, 2885-289 (1966) contains a recent restatement of the broad regulilatory power over intoxicating liquors possessed by the stateres. Senior Circuit Judge Duffy

also correctly noted in his dissenting opinion that this great police power of the states was increased by the passage of the Twenty-First Amendment to the United States Constitution, citing 48 C.J.S. Intoxicating Liquors § 33, p. 167.

Looking at the private interest of appellee Constantineau which was taken away by the government action under the statutes in question, it appears that the only right withdrawn was the right to obtain intoxicating liquors from the drinking places "posted" by defendant Grager within the City of Hartford, Wisconsin (1960 population 5,627: U.S. Census 1960). This right was withdrawn for a period of one year. The right to hold intoxicating liquors for personal use is not a fundamental right of citizens which no state may abridge. *Crane v. Campbell,* supra, 245 U.S. 308.

The majority below found an interest of appellee ". . . in not being exposed to unfounded public defamation, embarrassment, and ridicule." (Page 5a, Appendix A). That such an interest of appellee Constantineau was affected by the government action in this case is an assumption made by the majority having no basis in fact. The Court erred in not allowing appellant State of Wisconsin to elicit testimony relative to this point, Appellant had subpoenaed appellee Constantineau, who was present at the June 6, 1969 hearing; defendant Grager was also present to testify at this hearing (see Appendix D). Since the sole issue at the June 6, 1969 hearing was the constitutionality of secs. 176.26 and 176.28 (1), Wis. Stats. (see page 1a-2a, Appendix A), it would have been relevant for the lower court to hear testimony regarding the application of the statutes in the present case as an example of the general application of these statutes.

The lower court further erred in applying the above-cited balancing test of *Cafeteria Workers*, supra, to the facts

of this case. Other cases in which *Cafeteria Workers* was cited or applied and in which government action without a hearing was upheld reveal fact situations in which the private interest involved was more substantial than in this case and/or where the government power was not as great as in this case.

One line of these "no hearing" cases involves the summary discharge of government employees from their positions. Such discharge can be accomplished validly without a hearing. *Finfer v. Caplin*, 344 F. 2d 38 (1965); *Chafin v. Pratt*, 358 F. 2d 349 (1966); *Herak v. Kelly*, 391 F. 2d 216 (1968); *Jones v. Hopper*, 410 F. 2d 1323 (1969). The government function in such cases is that of maintaining a healthy civil service. *Jaeger v. Freeman*, 410 F, 2d 528 (1969). A hearing must be held, however, whenever a government employee is discharged in such a manner as to attach a stigma or badge of disloyalty which would affect his reputation and tend to limit his ability to secure employment elsewhere or would damage his career. *Slochower v. Board of Higher Education of the City of New York*, 350 U.S. 551, 555, 76 S.Ct. 637, 100 L.Ed. 692 (1956); *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L. Ed. 216 (1952); *Birnbaum v. Trussell*, 371 F. 2d 672, 678-679 (1966). (The preceding three cases did not cite *Cafeteria Workers*.)

Another related factor to consider in determining the requirements of procedural due process in any given situation is the alternatives available to the individual after the government action. *Cafeteria Workers*, supra, 367 U.S. 896, 898-899; *Parker v. Board of Education of Prince George's County, Md.*, 237 F.Supp.222, 228-229 (1965), aff'd 384 F. 2d 873 (1967), cert. denied, 390 U.S. 982, rehearing denied, 390 U.S. 1018, 393 U.S. 903.

The facts in this case reveal no stigma upon appellee's reputation in any manner which would affect her economically. It is also apparent that appellee was still free after defendant Grager's action to obtain intoxicating liquors anywhere except within the City of Hartford, Wisconsin.

Other "no hearing" cases citing the balancing test of *Cafeteria Workers* involve the barring of individuals from military bases by the base commander. The power of the government is great in regard to regulating its internal affairs and maintaining the national security. *Cafeteria Workers,* supra, 376 U.S. 896; *Weissman v. United States,* 387 F. 2d 271 (1967). Even when an individual's right to employment at a particular location has been withdrawn by the government, the action has been upheld even though a hearing was not held. *Cafeteria Workers,* supra. *United States v. Jelinski,* 411 F. 2d 475 (1969), is an excellent example of the application of the *Cafeteria Workers* test to uphold the exclusion of a civilian from a military base without notice and hearing. The Court weighed the unfettered power of the government to regulate military bases against the slight economic advantage to the individual in using the base facilities.

In applying the *Cafeteria Workers* balancing test, the courts have upheld the imposition by governmental administrative agency action of economic competition upon a business without the granting of notice and hearing to that business. Despite the great interest of the individual business, due process has been held not to require notice and hearing. *Law Motor Freight Inc. v. Civil Aeronautics Board,* 364 F.2d 139 (1966), cert. denied, 387 U.S. 905; *Continental Bank v. National City Bank,* 245 F.Supp. 684 (1965). A more esoteric economic interest of the regulated business

was withdrawn by government action without notice and hearing in *Fugazy Travel Bureau Inc. v. Civil Aeronautics Board*, 350 F.2d 733 (1965).

Finally, the courts have applied the *Cafeteria Workers* test to hold that a state may revoke a parole without granting the parolee notice and a hearing. *Rose v. Haskins*, 388 F.2d 91 (1968), cert. denied, 392 U.S. 946.

Appellee Constantineau had a means of obtaining a review of the actions of defendant Grager in "posting" her, namely, she could have sought a judicial review of the reasonableness of his actions by a common law writ of certiorari. *State ex rel.Thomson v. Nash*, 27 Wis. 2d 183, 194, 133 N.W. 2d 769 (1964); *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 199-200, 94 N.W. 2d 711 (1958). The court in *Sessions v. State of Connecticut*, 293 F.Supp. 834, 839, (1968) considered the availability to the plaintiff of the common law writ of mandamus while applying the *Cafeteria Workers* test to hold that plaintiff permanent state employee was not entitled to a hearing upon discharge from his government job.

Appellant State of Wisconsin asserts that the lower court improperly applied the *Cafeteria Workers* test in finding the necessity for notice and a hearing in this case. After all, "It cannot be contended either that due process *never* requires notice, a hearing, confrontation, and right to cross-examine, or that it *always* requires such procedures." *Murray v. Vaughn*, 300 F.Supp. 688, 706 (1969). In light of the relative balance between the government's power and the individual's interests found in the above cases in which due process was held not to require a hearing, and in light of the great government power in regulating liquor traffic and the miniscule private interest of obtaining liquor in the City of Hartford, Wisconsin, for one year, the lower court was incorrect in invalidating an important statutory scheme of the State of Wisconsin.

There are numerous factors which reflect the importance of this case: (1) The Court could clarify the requirements of due process in regard to instances where notice and hearing are not required. In view of the modern increase in government intervention into the private affairs of citizens and the expanding nature of due process, it is important to the practical operation of government that it be able to take some minimal action, such as the action taken in this case, without the necessity of notice and a hearing, and it is important both to government and to all private citizens to have a clarification by this Court of the circumstances under which government can so act; (2) An important section of the statutes of the State of Wisconsin has been held unconstitutional by a federal tribunal; (3) This federal tribunal was divided, with a dissenting opinion by Senior Circuit Judge F. Ryan Duffy; (4) Alcoholic posting statutes nearly identical to the statutes in question, with no provision for notice and a hearing, are found in fifteen other states (see Appendix E).

Appellant State of Wisconsin believes that the issues presented in this appeal are so substantial and are of such public importance that they require plenary consideration with briefs on the merits and oral arguments, for their resolution.

Respectfully submitted,

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Supreme Court

Norma Grace CONSTANTINEAU,
Plaintiff,
v.
James W. GRAGER, Chief of Police, Hartford, Wisconsin, and State of Wisconsin, Defendants.

No. 69-C-29

United States District Court
E. D. Wisconsin.
Aug. 18, 1969.

* * *

OPINION AND ORDER

Before DUFFY, Circuit Judge, and REYNOLDS and GORDON, District Judges.

REYNOLDS, District Judge.

The complaint herein, brought pursuant to § 1983 of Title 42 and § 2281 of Title 28 of the United States Code of Laws, challenges the constitutionality of §§ 176.26 and 176.28(1) of the Wisconsin Statutes. The basis of the alleged invalidity is the claim that these State statutes have and are depriving the plaintiff of due process of law in violation of the fourteenth amendment to the United States Constitution.

The first cause of action seeks damages, and the second seeks injunctive relief. At a pretrial conference held on March 25, 1969, it was agreed that the two causes of action would be separated, and the second cause of action would be decided first. Following an oral motion on behalf of the defendants for judgment on the pleadings in respect to the second cause

of action, it was further agreed that the sole issue for determination of the defendant's motion is whether the Wisconsin Statutes in question are on their face constitutional. A hearing limited to this issue was held on June 6, 1969.

FACTS

For the purposes of this motion, the facts as alleged in the pleadings will be regarded as true. The plaintiff, Norma Grace Constantineau, is an adult resident of the City of Hartford, Wisconsin. The defendant, James W. Grager, is the Chief of Police of the City of Hartford, Wisconsin.

On January 23, 1969, defendant Grager, in his capacity as Chief of Police and acting pursuant to §§ 176.26 and 176.28(1) of the Wisconsin Statutes, posted a notice in the retail liquor outlets in the City of Hartford, Wisconsin. This notice informed the person or establishment notified that they were forbidden "to sell or to give away to Norma Grace Constantineau any intoxicating liquors of whatever kind for a period of one year from date, under pain of the penalties provided by Sections 176.26 and 176.28(1) of the Wisconsin Statutes." This notice was signed by the defendant, James W. Grager, as Chief of Police on January 23, 1969.

It is uncontested that the plaintiff received no notice or hearing whatsoever prior to this posting, and that as a result of this posting she has been unable to purchase intoxicating liquors within the City of Hartford, Wisconsin.

STATUTES INVOLVED

The statutes pursuant to which the defendant Grager acted provide as follows:

> "176.26 Liquor; beer and ale; sale forbidden; to whom. (1) When any person shall by excessive drinking of intoxicating liquors, or fermented malt beverages

misspend, waste or lessen his estate so as to expose himself or family to want, or the town, city, village or county to which he belongs to liability for the support of himself or family, or so as thereby to injure his health, endanger the loss thereof, or to endanger the personal safety and comfort of his family or any member thereof, or the safety of any other person, or the security of the property of any other person, or when any person shall, on account of the use of intoxicating liquors or fermented malt beverages, become dangerous to the peace of any community, the wife of such person, the supervisors of such town, the mayor, chief of police or aldermen of such city, the trustees of such village, the county superintendent of the poor of such county, the chairman of the county board of supervisors of such county, the district attorney of such county or any of them, may, in writing signed by her, him or them, forbid all persons knowingly to sell or give away to such person any intoxicating liquors or fermented malt beverages, for the space of one year and in like manner may forbid the selling, furnishing, or giving away of any such liquors or fermented malt beverages, knowingly to such person by any person in any town, city or village to which such a person may resort for the same. A copy of said writing so signed shall be personally served upon the person so intended to be prohibited from obtaining any such liquor or beverage.

"(2) And the wife of such person, the supervisors of any town, the aldermen of any city, the trustees of any village, the county superintendent of the poor of such county, the mayor of any city, the chairman of the county board of supervisors of such county, the district attorney or sheriff of such county, may, by a notice made and signed as aforesaid, in like manner forbid all persons in such town, city or village, to sell or give away intoxicating liquors or drinks or fermented malt beverages to any person given to the excessive use of such liquors, drinks or beverages, specifying such person, and

such notice shall have the same force and effect when such specified person is a nonresident as is herein provided when such specified person is a resident of said town, city or village."

"176.28 Sale to forbidden person; evidence; pleading. (1) When the sale or giving away of any intoxicating liquors or fermented malt beverages to any person shall have been forbidden in the manner provided by law, every person who shall sell or give to, or for, or purchase or procure for, or in behalf of, such prohibited person any such intoxicating liquors or fermented malt beverages, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding $250 and the costs of prosecution; and in default of immediate payment thereof he shall be committed to the county jail or house of correction not less than 60 days unless sooner discharged by the payment of such fine and costs."

ARE THE STATUTES ON THEIR FACE UNCONSTITUTIONAL?

The issue before this court is not whether a State may regulate the sale or gift of liquor to persons who by their excessive drinking misspend their funds so as to expose themselves or their families to want or their communities to liability for the support of themselves or their families or endanger their own health or the peace and welfare of their communities. The power of a State to regulate the purchase, sale, or gift of intoxicating liquors within its borders is well established. Because of the well-recognized noxious qualities of such liquors and the potential extraordinary evil which may result from their misuse, this police power has been held to encompass absolute prohibition as well as severe restriction. Ziffrin, Inc. v. Reeves, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128 (1939); Crane v. Campbell, 245 U.S. 304, 38 S.Ct. 98, 62 L.Ed. 304 (1917). Rather the issue raised by this cause

of action of the complaint is whether these particular statutes, enacted for an admittedly legitimate State objective, are nonetheless unconstitutional because in reaching that objective they violate the constitutional rights of individuals who are "posted."

It is the opinion of this court that §§ 176.26 and 176.28 (1) of the Wisconsin Statutes are on their face unconstitutional in that they violate the procedural due process requirements of the fourteenth amendment to the United States Constitution. The concept of procedural due process is an elusive concept, the exact meaning of which varies with the particular factual context. As stated in Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed. 2d 1230 (1961)-

> "* * * consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. * * *"

In the instant case, the private interest affected by the statutes is not only the ability of the plaintiff to purchase alcoholic beverages within the City of Hartford, but also the interest of the plaintiff in not being exposed to unfounded public defamation, embarrassment, and ridicule. On the other hand, the governmental interest involved is the function of the State in regulating the sale of alcoholic beverages so as to prevent the dangers to individuals and the public that stem from their excessive use.

It is the defendant's position that having delineated the relative interests involved, procedural due process in the given situation does not require notice and hearing prior to "posting." They contend that when one weighs the police

power of the State to control intoxicating liquors with the interest of the plaintiff in this case, the balance is clearly struck in favor of the former. With this conclusion we cannot agree.

In "posting" an individual, the particular city official or spouse is doing more than denying him the ability to purchase alcoholic beverages within the city limits. In essence, he is giving notice to the public that he has found the particular individual's behavior to fall within one of the categories enumerated in the statutes. It would be naive not to recognize that such "posting" or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State statute can make such a quasi-judicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter.

[1] At the very minimum, due process requires that a person about to be "posted" be given an opportunity to answer the allegation that his behavior brings him within one of the categories set forth in the statutes. The statutes, however, include no provision whatsoever for either notice or hearing prior to "posting," and for this reason it is our opinion that they are unconstitutional on their face.

[2] In ruling that a person about to be "posted" is entitled to an opportunity to be heard, we do not mean that he is entitled to a full hearing with all of the constitutional ramifications thereof. Such a person is entitled, however, to an opportunity to confront the person claiming that his conduct warrants his being "posted" and to present his side of the story before he is in fact "posted."

The statutes involved also present serious constitutional questions with regard to the scope of persons to whom the "posting" is delegated as well as the definitiveness of the grounds for which an individual can be posted. However, having found that the statutes are unconstitutional as violative of due process, we do not find it necessary to reach these additional issues.

For the foregoing reason, it is the opinion of this Court that §§ 176.26 and 176.28(1) of the Wisconsin Statutes are on their face unconstitutional.

DUFFY, Senior Circuit Judge (dissenting).

I respectfully dissent. I believe my colleagues have failed to give effect to the well-established law that the states of our country possess a very high degree of police power in all matters pertaining to the regulation of intoxicating liquors.

"The power of a state to absolutely prohibit the sale of intoxicating liquor includes the power to permit the sale thereof under definitely prescribed conditions, and such business or traffic may be permitted only under such conditions as will limit to the utmost its evils. Similarly, the power to prohibit absolutely the manufacture of intoxicating liquors includes the power to prohibit conditionally, or to impose reasonable regulations or conditions upon, such manufacture." 30 Am.Jur., Intoxicating Liquors, §§ 23, p. 541.

Over fifty years ago the United States Supreme Court recognized that "* * * the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge." Crane v. Campbell, 245 U.S. 304, 308, 38 S.Ct. 98, 99, 62 L. Ed. 304 (1917). This statement was specifically approved in

Samuels v. McCurdy, 267 U.S. 188, 45 S.Ct. 264, 69 L.Ed. 568, in an opinion written by Chief Justice Taft.

In Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230, the Supreme Court stated: "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

We should here weigh the nature of the government's functions and powers against the affected right of the individual. We note that plaintiff's attorney, both in his brief and on oral argument, conceded that the right of his client to drink intoxicating liquors is not a right protected by the United States Constitution. In Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 72, 75 S.Ct. 614, 615, 99 L.Ed. 897, the Court said: "Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment, can its protection be invoked."

The great police power of the states over intoxicating liquor already existing was increased by the passage of the Twenty-first Amendment to the United States Constitution. That amendment provides in substance: "The transportation or importation into any State [or] Territory * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." It is thus clear that the Twenty-first Amendment to the federal Constitution bestows on the states broad regulatory power over the liquor traffic. In 48 C.J.S. Intoxicating Liquors § 33, p. 167, it is stated: "The

Twenty-First Amendment to the federal Constitution bestows on the states broad regulatory power over the liquor traffic."

In Crowley v. Christensen, 137 U.S. 86, 90-91, 11 S.Ct. 13, 15, 34 L.Ed. 620, the Court stated: "Not only may a license be exacted from the keeper of the saloon * * * but restrictions may be imposed as to the class of persons to whom they may be sold * * *."

In Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, *supra*, plaintiff Rachel Brawner was a shortorder cook in a cafeteria operated by her employer on a military base supervised by the defendant Secretary of Defense. She had worked there for six years. Her employer was satisfied with her work. The defendant withdrew her right to enter on the military base which was, of course, a condition necessary for her employment. Plaintiff challenged defendant's action saying that due process required that she be given notice of a hearing before any such action could be taken. The Supreme Court held that defendant's ex parte actions met the requirement of due process despite the absence of any notice to the plaintiff or a hearing.

In the *Cafeteria & Restaurant Workers'* case, *supra*, the Court noted that the plaintiff was free to obtain employment as a shortorder cook with the same employer at another location, saying: "All that was denied her was the opportunity to work at one isolated and specific military installation." 367 U.S. 896, 81 S. Ct. 1749.

Here, it can be stated that while bartenders in Hartford were prohibited from selling intoxicating liquors to the plaintiff, such prohibition was restricted to the city of Hartford and for a period of one year.

In Parker v. Board of Education of Prince George's County, Md., D.C., 237 F.Supp. 222 at 228, the Court noted that the plaintiff was denied the right to work in the public schools in one county in Maryland. In Chafin v. Pratt, 5 Cir., 358 F.2d 349, 357, the Court noted that plaintiff "was free to work elsewhere."

There is here no claim by plaintiff that the statement prepared by the defendant pursuant to Wisconsin Statutes § 176.26 and § 176.28 was untrue or unwarranted. There was no effort by the plaintiff to obtain a hearing before the defendant or anyone else.

In view of the unreversed decisions of the United States Supreme Court, I conclude that the requirements of due process are met by Sections 176.26 and 176.28(1) of the Wisconsin Statutes. If the Supreme Court's decisions are to be disregarded or modified, I think that is the prerogative of the Supreme Court and that it is not the prerogative of a United States District Court.

ORDER

(Formal Parts Omitted)

This matter having come before the three-judge district court, hereinbefore convened, for a hearing on the second cause of action alleged in the complaint which challenges the constitutionality of §§ 176.26 and 176.28(1) of the Wisconsin Statutes, and the Court having heard counsel and being fully advised in the premises, and a majority of said court being of the opinion that §§ 176.26 and 176.28(1) of the Wisconsin Statutes are unconstitutional on their face,

IT IS NOW THEREFORE ORDERED that the defendants herein be and they are enjoined from enforcing the provisions of §§ 176.26 and 176.28(1) of the Wisconsin Statutes.

Dated at Milwaukee, Wisconsin, this *25th* day of November, 1969.

/s/ JOHN W. REYNOLDS
U. S. District Judge

Wisconsin Statutes

176.26 Liquor; beer and ale; sale forbidden; to whom. (1) When any person shall by excessive drinking of intoxicating liquors, or fermented malt beverages misspend, waste or lessen his estate so as to expose himself or family to want, or the town, city, village or county to which he belongs to liability for the support of himself or family, or so as thereby to injure his health, endanger the loss thereof, or to endanger the personal safety and comfort of his family or any member thereof, or the safety of any other person, or the security of the property of any other person, or when any person shall, on account of the use of intoxicating liquors or fermented malt beverages, become dangerous to the peace of any community, the wife of such person, the supervisors of such town, the mayor, chief of police or aldermen of such city, the trustees of such village, the county superintendent of the poor of such county, the chairman of the county board of supervisors of such county, the district attorney of such county or any of them, may, in writing signed by her, him or them, forbid all persons knowingly to sell or give away to such person any intoxicating liquors or fermented malt beverages, for the space of one year and in like manner may forbid the selling, furnishing, or giving away of any such liquors or fermented malt beverages, knowingly to such person by any person in any town, city or village to which such person may resort for the same. A copy of said writing so signed shall be personally served upon the person so intended to be prohibited from obtaining any such liquor or beverage.

"(2) And the wife of such person, the supervisors of any town, the aldermen of any city, the trustees of any village, the county superintendent of the poor of such county, the mayor of any city, the chairman of the county board of supervisors of such county, the district attorney or sheriff of such county, may, by a notice made and signed as aforesaid, in like manner forbid all persons in such town, city or village, to sell or give away intoxicating liquors or drinks or fermented malt bever-

ages to any person given to the excessive use of such liquors, drinks or beverages, specifying such person, and such notice shall have the same force and effect when such specified person is a nonresident as is herein provided when such specified person is a resident of said town, city or village."

"176.28 Sale to forbidden person; evidence; pleading. (1) When the sale or giving away of any intoxicating liquors or fermented malt beverages to any person shall have been forbidden in the manner provided by law, every person who shall sell or give to, or for, or purchase or procure for, or in behalf of, such prohibited person any such intoxicating liquors or fermented malt beverages, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding $250 and the costs of prosecution; and in default of immediate payment thereof he shall be committed to the county jail or house of correction not less than 60 days unless sooner discharged by the payment of such fine and costs."

AFFIDAVIT

STATE OF WISCONSIN)
) ss
DANE COUNTY)

I, Benjamin Southwick, being on oath and duly sworn do certify that:

(1) I am an Assistant Attorney General in the State of Wisconsin Department of Justice and that I represent defendant State of Wisconsin in Norma Grace Constantineau v. James W. Grager, Chief of Police, Hartford, Wisconsin, and State of Wisconsin, United States District Court, Eastern District of Wisconsin, Case No. 69-C-29 and that I wrote a Brief in Support of Defendants' Motion for Summary Judgment and, In The Alternative, For Judgment On The Merits and that I argued on behalf of defendant State of Wisconsin at the hearing on June 6, 1969 on defendants' motion for judgment on the pleadings on which motion it had been stipulated that the sole issue for the motion was the constitutionality of secs. 176.26 and 176.28 of the Wisconsin Statutes.

(2) That in order to provide an example of the operation of the Wisconsin Statutes in question, namely, secs. 176.26 and 176.28 (1), that I intended to call two witnesses in conjunction with the presentation of defendants' case at said hearing held on June 6, 1969.

(3) That in preparation for said hearing I caused a subpoena and the appropriate mileage fees, as required by Title 28, sec. 1821 U.S.C., as amended, to be served upon the plaintiff Norma Grace Constantineau, and that the attached Exhibits A, B and C reflect the summons served, the certified check, and the proof of service which was served upon said plaintiff.

(4) That the plaintiff Norma Grace Constantineau, and the defendant James W. Grager, Chief of Police, City of Hartford, Wisconsin, were present at said June 6, 1969 hearing.

(5) That it was my intention to ask questions of Norma Grace Constantineau and to elicit testimony from her concerning her place of residence, her reputation in the City of Hartford, Wisconsin, her habits in relation to the consumption of alcoholic beverages, any public defamation, embarrassment and ridicule which she may or may not have suffered as a result of the actions of the defendant James W. Grager taken pursuant to secs. 176.26 and 176.28 (1) of the Wisconsin Statutes, and other matters concerning said case.

(6) That it was my intention to ask questions of James W. Grager, and to elicit testimony from him as to the basis for his actions under said sections of the Wisconsin Statutes in relation to the plaintiff Norma Grace Constantineau and as to his actions pursuant to said statutory sections in relation to said plaintiff.

(7) That I requested permission of the three-judge panel consisting of United States Circuit Judge F. Ryan Duffy, and United States District Judges Myron L. Gordon and John W. Reynolds, constituting the said three-judge panel pursuant to Title 28, sec. 2281, U.S.C., to call said witnesses and to elicit testimony from them.

(8) That the said court denied my request to call witnesses and that I was not allowed to call said witnesses.

Dated at Madison, Wisconsin, this 5 day of January 1970.

/s/ Benjamin Southwick
BENJAMIN SOUTHWICK
Assistant Attorney General

Subscribed and sworn to
before me this *5th* day
of January 1970.

/s/ John C. Murphy
Notary Public, Dane County, Wisconsin
My commission: *is permanent*

EXHIBITS A, B, & C, mentioned hereinabove are omitted.

Connecticut

General Statutes, Title 30, sec. 30-83:

"30-83. Selectmen to give permittees lists of drinkers receiving town aid. The selectmen of every town shall, annually or oftener, at their discretion, prepare a list of persons known to use alcoholic liquor to whom town aid for support has been furnished within the six months last past, and lodge a copy of such list with each person holding a permit to sell such alcoholic liquor in such town, forbidding the gift, sale or delivery of such liquor to any person whose name appears on such list, or to any member of his legal family except upon a physician's prescription endorsed by a member of the board of selectmen in such town. Every permittee who, by himself, his servant or agent, sells, gives, exchanges or delivers alcoholic liquor to the persons described in this section after receiving such notice from such selectmen shall be subject to the penalties of section 30-113."

General Statutes, Title 30, sec. 30-84:

"30-84. Sales to relatives. Whenever any person complains to any of the selectmen of any town or to any prosecuting officer that his or her father, mother, husband, wife, child, brother, sister or ward is addicted to the excessive use of alcoholic liquor and requests such selectmen or prosecuting officer, in writing, to notify the permittees in such town not to sell, exchange or give any such liquors to such father, mother, husband, wife, child, brother, sister or ward, such selectmen or such prosecuting officer shall, on being satisfied that such complaint is true, forthwith notify in writing every permittee in such town that such request has been made and that the sale, exchange or gift of any such liquor to such father, mother, husband, wife, child, brother, sister or ward is forbidden by law, giving the name and address of such person to whom the sale, exchange or gift of such liquor is forbidden, and such selectmen or

prosecuting officer shall keep a record of such notification, which may be used as evidence. Such notification shall remain in force so long as such permittees continue to be permitted to sell alcoholic liquor, but the selectmen or prosecuting officer may revoke such notification at any time after one year from the date of its service."

General Statutes, Title 30, sec. 30-85:

"30-85. Liquors not to be sent to certain persons or their abodes. Every person who, except upon the written order of a practicing physician, carries or conveys to any person or to his abode any alcoholic liquor, the sale or gift of which to such person has been forbidden by section 30-83 or 30-84, or who delivers to any person any such liquor for the use of any person to whom such sale or gift has been forbidden by either of said sections, shall be subject to the penalties of section 30-113."

General Statutes, Title 30, Sec. 30-86:

"Sec. 30.86. Sales to minors, intoxicated persons and drunkards. Any permittee who, by himself, his servant or agent, sells or delivers alcoholic liquor . . . to any habitual drunkard, knowing him to be such an habitual drunkard, or to any person after having received notice from the selectmen, as provided in section 30-83 or 30-84, not to sell or give such liquor to such person, . . . except on the order of a practicing physician, shall be subject to the penalties of section 30-113."

Delaware

Del. Code, Title 4, sec. 715 (a) (6) (b):

"715. Prohibition of sales to certain persons.

"(a) No person shall sell any alcoholic liquor to any--

"(6) Individual who habitually drinks alcoholic liquor to excess, or to whom the Commission has, after

investigation, decided to prohibit the sale of such liquor because of an appeal to the Commission by the husband, wife, father, mother, brother, sister, employer or other person depending upon, employing or in charge of such individual, or by the mayor or other competent representative of any city, town, or other incorporated place; the interdiction in such case shall last until removed by the Commission.

"(b) No sale made to any person mentioned in this section, other than an individual who has not reached the age of 21 years, shall constitute a misdemeanor unless the Commission has informed the seller, by registered letter, that it is forbidden to sell to such person or unless the fact is otherwise known to the seller."

Florida

Florida Stats., Title 32, sec. 562.50:

562.50 Habitual drunkards; furnishing intoxicants to, after notice

Any person who shall sell, give away, dispose of, exchange or barter any malt, spirituous or vinous liquors, including beer, ale and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition or any article whatsoever under any name, label or brand, which produces intoxication, to any person habitually addicted to the use of any or all such intoxicating liquors, after having been given written notice by wife, husband, father, mother, sister, brother, child or nearest relative that said person so addicted is an habitual drunkard and that the use of intoxicating drink or drinks is working an injury to the person using said liquors, or to the person giving said written notice, shall, upon conviction thereof, be sentenced to a term of imprisonment for not more than six months, or by fine of not more than five hundred dollars, or both, for each and every such offense."

Georgia

Code of Georgia, Title 58, sec. 611:

"611. Furnishing liquor to habitual drunkard.—Any person who shall furnish any spirituous, malt, or intoxicating liquors in any quantity to an habitual drunkard personally known to him, of whose intemperate habits such person has been notified in writing, protesting against the selling or furnishing such intoxicating liquors, by the wife, father, mother, brother, or sister of such drunkard, shall be guilty of a misdemeanor."

Code of Georgia, Title 58, sec. 1061:

"1061. Sales to minors, intoxicated persons, and habitual drunkards prohibited.—Any person who by himself or another shall furnish or cause to be furnished or permit any person in his employ to furnish alcoholic, spirituous liquors, or beverages to any minor, to any person who is noticeably intoxicated, or to any habitual drunkard whose intemperate habits are known to such person, shall be guilty of a misdemeanor, and, upon conviction, shall be punished as for a misdemeanor."

Maryland

Code of Maryland, Art. 2B, sec. 119 (a):

"119. Sales to drunkards, etc.

(a) *Generally.*—No licensee under the provisions of this article, or any of his employees, shall knowingly sell, barter, furnish, or give any intoxicating beverages to a habitual drunkard, or to a mentally deficient person, or to any person whose parent or parents, guardian, husband, wife, son, daughter, brother, or sister shall have given notice in writing, that such person is of intemperate habits, or of unsound mind, or on account

of his or her physical condition and request said licensee in writing, not to sell, barter, furnish or give any intoxicating beverages to him or her; and the word 'knowingly,' as to habitual drunkards should be construed to mean such knowledge as a reasonable man would have under ordinary circumstances, from the habits, appearances or personal reputation of such individual. Any person violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding $50.00 for the first offense and for each succeeding offense shall be fined not exceeding $100.00 or imprisoned in the county jail for not more than thirty days, or be both fined and imprisoned in the discretion of the court."

Minnesota

Minnesota Statutes, sec. 340.78:

"340.78 Sales to minors and others, after notice

"Every person selling liquor to a . . . habitual drunkard, or person under guardianship, after written notice by a parent, husband, wife, child, guardian, master, or employer of such . . . habitual drunkenness, or guardianship, or in the case of an habitual drunkard after written notice by the mayor, chief of police, or any member of the council of the municipality in which such habitual drunkard resides, or member of the county board of the county in which such habitual drunkard resides, and within one year after such notice in case of an habitual drunkard, and in other cases during the continuance of the minority, or guardianship, shall be punished by a fine of not less than $50, nor more than $100 or imprisonment in the county jail for not less than 30 nor more than 90 days."

Minnesota Statutes, sec. 340.73:

"340.73 Persons to whom sales are illegal

"* * *

"Subd. 2. It shall be unlawful for any person except a licensed pharmacist to sell, give, barter, furnish or dispose of, in any manner, either directly or indirectly, any spirituous, vinous, malt or fermented liquors in any quantity, for any purpose, whatever, to any spendthrift, habitual drunkard, or improvident person, within one year after written notice by any peace officer, parent, guardian, master, employer, relative, or by any person annoyed or injured by the intoxication of such spendthrift, habitual drunkard, or improvident person, forbidding the sale of liquor to any such spendthrift, habitual drunkard, or improvident person.

Subd. 3. Whoever shall in any way procure liquor for the use of any person named in this section shall be deemed to have sold it to such person. Any person violating any of the provisions of this section is guilty of a gross misdemeanor. As amended Laws 1947, c. 87, § 1."

Minnesota Statutes, sec. 340.81:

"340.81 Exclusion of minors from places where liquor is sold after notice; penalty

"No . . . intemperate drinker, habitual drunkard, inmate of a poor or alms house, or person under guardianship, shall be allowed in any room where intoxicating liquor is sold in less quantities than five gallons as a beverage, after written notice upon the licensee or his agent, by parent, husband, wife, child, guardian, master or employer of such . . . intemperate drinking, habitual drunkenness or guardianship, or in the case of an intemperate drinker, inmate of a poor or alms house, or habitual drunkard, after written notice by the mayor, chief of police, judge of the municipal court, or any member of the council of the municipality in which such intemperate drinker, or habitual drunkard, resides, or member of the county board of the county in which such inmate of a poor or alms house, intemperate drinker or habitual drunkard resides, and within one year after such notice, in case of an inmate of a poor or alms house,

intemperate drinker or habitual drunkard, and in other cases during the continuance of the minority or guardianship. Any violation of this section shall be punished by a fine of not less than $25 nor more than $100 or by imprisonment in the county jail for not less than 30 nor more than 90 days."

Nevada

Revised Statutes, sec. 202.100:

"202.100 Sale of intoxicating liquor to drunkards; penalty for drunkenness.

"1. It shall be unlawful for the proprietor, bartender or person in charge of any saloon or bar to sell or give, or to permit to be sold or given, any intoxicating liquor to any person who is drunk, or to any person known by such proprietor, bartender or person in charge to be an habitual drunkard or dipsomaniac, or to any habitual drunkard or dipsomaniac, after being notified by the wife, father or mother, son or daughter of such habitual drunkard or dipsomaniac, or by any peace officer, not to sell or give liquor to such habitual drunkard or dipsomaniac. The proprietor, bartender or person in charge of any saloon or bar may post behind the bar, where the same may be readily seen by the bartender, but may not be seen by the persons in front of the bar, a list of names of habitual drunkards, or persons to whom intoxicating liquors are not to be sold.

"2. It shall be unlawful for any habitual drunkard, dipsomaniac or drunken person, after being refused intoxicating liquor, to demand again the same on the same day from the person refusing to sell or to give him intoxicating liquors.

"3. It shall be unlawful for any person to sell any intoxicating liquor to any husband or father whose wife, or minor child or children, are in destitute circumstances and who are not supplied with the common necessaries of life by such husband or father, after notice from the wife or minor child of such husband or father, or from

any peace officer, not to sell any intoxicating liquor to such husband or father, and that such husband or father fails to provide his wife or minor child with the common necessaries of life.

"4. Any person violating any provision of this section, or who, as a result of the use of intoxicating liquors, shall abuse or fail properly to support or care for his wife or any minor child lawfully in his custody, shall be guilty of a misdemeanor."

New Hampshire

Revised Statutes, sec. 175.6:

"175.6 Prohibited Sales. No licensee, sales agent, nor any other person, shall sell or give away or cause or permit or procure to be sold, delivered or given away any liquor or beverage to . . . an habitual drunkard, . . . or to any other person to whom any court, selectman of a town, chief of police, overseer of public welfare or the commission shall prohibit sale...."

New Jersey

Statutes, sec. 33:1-39:

"33:1-39. Rules and regulations by commissioner; subjects covered

"The commissioner may make such general rules and regulations and such special rulings and findings as may be necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages and the enforcement of this chapter, in addition thereto, and not inconsistent therewith, and may alter, amend, repeal and publish the same from time to time.

"Such rules and regulations may cover the following subjects: . . . sales to defectives and habitual drunkards; out-of-door sales; limitation of sales, limitation of the quantity to be sold to a consumer for off-premises consumption, . . . practices unduly designed to increase

consumption of alcoholic beverages; . . . and such other matters whatsoever as are or may become necessary in the fair, impartial, stringent and comprehensive administration of this chapter."

North Carolina

General Statutes, sec. 18-45:

"18-45. Powers and duties of county boards.—The said county boards shall each have the following powers and duties:

"(1) Control and jurisdiction over the importation, sale and distribution of alcoholic beverages within its respective county.

"(2) Power to buy and to have in its possession and to sell alcoholic beverages within its county.

"(3) Power and authority to adopt rules and regulations governing the operation of stores within its county and relating to the carrying out of the provisions and purposes of this article.

* * *

"(12) To require liquor stores to sell alcoholic beverages at the prices fixed by the State Board of Alcoholic Control, and to prescribe to whom the same may be sold."

General Statutes, sec. 18-46:

"18-46. No sales except during hours fixed by county boards; sales to minors, habitual drunkards, etc.; discretion of managers and employees; list of persons convicted of drunkenness, etc.; unlawful to buy for person prohibited.—No alcoholic beverage shall be sold knowingly by any county store or the manager thereof or any employee therein at any time other than within the opening and closing hours for said store, as fixed in the manner herein provided, and otherwise as prescribed by the said county board. No alcoholic

beverage shall be sold knowingly to . . . any person known to be an habitual drunkard or who has within one year been confined in the inebriate ward of any State institution. The manager and employees of and in any county store may, in their discretion, refuse to sell alcoholic beverage to any individual applicant, and such power and the duty to exercise the same shall vest in and apply to such manager and employees, regardless of the failure of the county boards to make any regulations providing for the same, and in their discretion may refuse to sell more than four quarts at any one time in any one day to any person.

"The various clerks of the superior court and of any inferior courts in counties coming under the provisions of this article shall furnish to the chairman of the control board of their county a list of all persons convicted of public drunkenness or convicted of driving an automobile while intoxicated; and the State Motor Vehicle Department shall furnish to the chairmen of all the control boards in this State a list of all persons whose driving licenses have been revoked for driving an automobile while intoxicated, or for the illegal use of whiskey.

"It shall be unlawful for any person to buy any alcoholic beverage if he be within the class prohibited from purchasing same as set out in this section, and it shall further be unlawful for any person to buy any alcoholic beverage for any person who may be prohibited from purchasing for himself under any of the provisions of this article."

Ohio

General Code, sec. 6064-22:

"6064-22. [Restrictions on sales of beer and intoxicating liquor; age limit, hours, etc.] Sales of beer and intoxicating liquor under any and all classes of permits authorized by the liquor control act and from state

liquor stores, shall be subject to the following restrictions, in addition to those lawfully imposed by the rules, regulations, or orders of the department, to-wit:

* * *

"3. No intoxicating liquor shall be sold to any individual who habitually drinks intoxicating liquor to excess, or to whom the department has, after investigation, determined to prohibit the sale of such intoxicating liquor, because of cause shown by the husband, wife, father, mother, brother, sister, or other person dependent upon, or in charge of such individual, or by the mayor of any municipal corporation, or a township trustee of any township in which the individual resides. The order of the department in such case shall remain in effect until revoked by the department."

Rhode Island

General Laws, sec. 3-11-2:

"3-11-2. Habitually intemperate persons—Notice by family or employer—Liability.—The husband, wife, parent, child, guardian or employer of any person who has or may hereafter have the habit of drinking intoxicating beverage to excess, may give notice in writing, signed by him or her, to any person requesting him not to sell or deliver intoxicating beverage to the person having such habit. If the person, so notified, at any time within twelve (12) months thereafter sells or delivers any intoxicating beverage to the person having such habit, or permits such person to loiter on his premises, the person giving the notice may in an action of trespass on the case recover of the person notified such sum as may be assessed as damages; provided, the employer giving said notice shall be injured in his person, business or property. A married woman may bring such action in her own name, and all damages recovered by her shall enure to her separate use. In case of the death of either party, the action and right of action shall survive to or against his executor or administrator."

South Dakota

Compiled Laws, sec. 35-4-78:

"35-4-78. Persons to whom sale of liquor prohibited--Violation as misdemeanor--Second offense as felony--Penalties.--No licensee shall sell any intoxicating liquor:

* * *

"(2) To any person who is . . . known to the seller to be an habitual drunkard;

"(3) To any person to whom the seller has been requested in writing not to make such sale, where such request is by the commissioner of revenue, any police or peace officer, or the husband, wife, mother, father, brother, sister, or child of the person;

"(4) To any spendthrift, mentally ill, or mentally retarded person;

"(5) To any person who is known to be the object of charity, or is known to be supported by any charitable association or institution."

Vermont

Statutes, Title 7, sec. 505:

"505. Notice to prohibit sales to certain persons

"The father, mother, husband, wife, child, brother, sister, guardian or employer of a person or an overseer of the poor of a town with respect to persons supported in whole or in part by such town, may, in writing, notify any board of control commissioners as defined in section 2 of this title, who may, on investigation, forbid the sale or furnishing of spirituous liquor or malt and vinous beverages or both by licensees as defined in section 2 of this title, within the jurisdiction of such board of control commissioners to such person."

Statutes, Title 7, sec. 506:

"506. Record of notices

"Such board of control commissioners shall place on file the notices received under section 505 of this title and they shall be open to public inspection at reasonable times, except that the notices of a husband, father, wife, child, mother or a sister provided for in section 505 of this title shall not be open to inspection nor be disclosed by such board of control commissioners. Upon receipt of a notice, such board of control commissioners may, upon investigation, give written notice forbidding the sale or furnishing of spirituous liquors or malt and vinous beverages or both to such person and to all licensees within the jurisdiction of such board of control commissioners.

"Copies of all notices sent by a board of control commissioners shall be furnished forthwith to the liquor administrator who may upon receipt of such copy forbid the sale of spirituous liquors by any state agency or agencies to such person."

Statutes, Title 7, sec. 507:

"507. Expiration of notices

"All notices given under section 506 of this title shall expire six months from their date unless sooner revoked."

Wyoming

Statutes, sec. 12-33:

"12-33. Minors, habitual drunkards and incompetents — Restrictions generally.—(a) Every holder of a license issued under the provisions of this act (sections 53-201 and [to] 53-236, Wyoming Compiled Statutes, 1945) or the servant or employee of such holder, who shall sell, give or deliver alcoholic or malt beverages to any habitual drunkard; and every person, firm or

corporation or his agent or agents who shall sell alcoholic or malt beverages to any habitual drunkard or any incompetent person . . . shall be guilty of a misdemeanor."

Statutes, sec. 12-34:

"12-34. Same–Sale after notice to licensee or permittee.–Whenever any court, parent or guardian shall notify any licensee or permittee . . . that his or her spouse or person liable for the support of such dependant is an habitual drunkard and by reason of such habitual drunkeness [drunkenness] is neglecting to provide support for such spouse or dependent, by written notice, and the licensee or permittee so notified shall thereafter sell or give any alcoholic or malt liquor to such child, ward, or habitual drunkard, the person giving such notice may bring an action in the district court, against such licensee or permittee and upon proof of acts stated in the notice recover in such action the actual damages sustained, punitive damages of not less than one hundred dollars ($100.00) and costs."

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No.

NORMA GRACE CONSTANTINEAU, Appellee

vs

JAMES W. GRAGER, CHIEF OF POLICE OF HARTFORD, WISCONSIN, Defendant
STATE OF WISCONSIN, Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or in the alternative, to affirm the judgment of the three Judge United States District Court on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

ARGUMENT

THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

A mere examination of questions 2 and 3 presented by appellant indicates the same are mere questions of practise and procedure and pose no federal substantive questions whatsoever.

With reference to question one, presented by the appellant the statutes in question were never the subject of litigation on the appellate level in Wisconsin, and in the few other jurisdictions where such laws exist they never have been questioned as to their validity. Furthermore, in Delaware, Florida, Maryland, Nevada, Rhode Island, Connecticutt, Vermont and Wyoming where similar statutes exist, no appellate court ever considered a case involving any aspect of these laws, much less their alleged validity. In two of the states which have such statutes, as cited by Appellant, New Hampshire and South Dakota, there have been only one case in each such jurisdiction dealing with these laws, and they have not touched on their invalidity. State v. Small (1955), 99 N.H. 349, 111 A 2d 201; State v. Horner, (1915), 35 S.D. 612, 153 NW 766. The statutes of New Jersey and North Carolina, cited by appellant are not in point as no question of procedural due process in the posting of notices is involved. Only in Minnesota of all the states which have such statutes, has there been any litigation involving these laws, the most recent of which is State v. Provencher, (1915), 129 Minn. 409, 152 NW 775.

No substantial federal question exists that would require the jurisdiction of the United States Supreme Court to be noted:

> "The federal statutes are not a measure of broad social policy to be construed with great liberality but are enactments technical in the strict sense of the term and are to be applied as such, being given a strict construction to protect the appellate docket of the Supreme Court. They are intended by congress as a procedural protection against an unprovident state wide doom by a federal court of a state's legislative policy and their purpose is to minimize, in an important class of cases, the delay incident to a review of a decress granting or denying an injunction.
>
> The statutes apply only where there is a substantial claim of invalidity under the Federal Constitution and where an application for an injunction for the purposes contemplated by the statute is made and pressed." (Emphasis added). C.J.S. Federal Courts, Sec. 220, pp. 686-7.

See also Ex Parte Bruder, 271 U.S. 461, 465, 46 S. Ct. 557, 70 L. ed. 1036; Brucker v. Fischer, (C.C.A. Mich.), 49 F.2d 759; Stratton v. St. Louis S.W. Ry Co. (Ill.), 51 S. Ct. 8, 272 U.S. 317, 71 L. ed. 273.

It is apparent from an examination of the statutes and from the lack of litigation involving these laws, that they play no significant or substantial part of the state wide legislative policy of Wisconsin concerning liquor.

CONCLUSION

For the above and foregoing reasons it is respectfully prayed that the appeal be dismissed or alternatively, that the decision of the Three Judge Court be affirmed.

Respectfully Submitted,

S. A. SCHAPIRO
Attorney for Appellee

Member of Bar,
United States Supreme Court

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1221

STATE OF WISCONSIN, Appellant,

v.

NORMA GRACE CONSTANTINEAU, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin is reported at 302 F. Supp. 861 (1969) and is set forth in A. 114-123.

JURISDICTION

This cause of action was brought under 28 U.S.C. 2281 and 2284, to enjoin the actions of Police Chief Grager taken pursuant to secs. 176.26 and 176.28 (1), Wis. Stats. The order

of the three-judge District Court was entered on November 25, 1969 (A. 124). Notice of Appeal was filed in that Court on December 24, 1969. The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2102 (b). This case was docketed on February 21, 1970 and probable jurisdiction was noted on March 23, 1970.

QUESTIONS PRESENTED

(1) Do secs. 176.26 and 176.28 (1), Wis. Stats., violate the procedural due process requirement of Amendment Fourteen, Section 1, United States Constitution?

(2) Did the lower court err in refusing to allow appellant to call witnesses and elicit testimony at the hearing on defendant's and appellant's motion for judgment on the pleadings, at which hearing it was agreed that the sole issue for determination was the constitutionality of secs. 176.26 and 176.28 (1), Wis. Stats.?

(3) Did the lower court err in basing its opinion of August 13, 1969, that secs. 176.26 and 176.28 (1), Wis. Stats., were unconstitutional upon an assumption that appellee would be exposed to "unfounded public defamation, embarrassment, and ridicule" by the operation of said Wisconsin Statutes, when no such facts appeared in the record nor were they correct in fact?

STATUTES INVOLVED

Secs. 176.26 and 176.28 (1), Wis. Stats., are involved in this case and are set forth at A. 116-117.

STATEMENT

The Appellee, Norma Grace Constantineau, is an adult resident of the City of Hartford (1960 population: 5,627. U. S. Census, 1960), (A. 102). The defendant below, James W. Grager, is Chief of Police of the City of Hartford, Wisconsin (A. 103).

On January 23, 1969, Mr. Grager, in his capacity as Chief of Police of Hartford, Wisconsin, and acting pursuant to secs. 176.26 and 176.28 (1), Wis. Stats., posted a Notice in all of the retail liquor outlets in the City of Hartford (A. 103). This Notice, a copy of which is set forth at A. 106-107, informed the notified persons or establishments that they were forbidden "to sell or give away to Norma Grace Constantineau any intoxicating liquors of whatsoever kind for a period of one year from date, under pain of the penalties provided by Sections 176.26 and 176.28 (1) of the Wisconsin Statutes." (A. 106)

Appellee Constantineau then began this action in the United States District Court for the Eastern District of Wisconsin by effecting the service of a summons and complaint upon Chief Grager on January 31, 1969. (R. 7-8). A claim for damages under 28 U.S.C. 1343 (3) and 42 U.S.C. 1983 was asserted in the first cause of action; in the second cause of action, Mrs. Constantineau requested the convening of a three-judge court under 28 U.S.C. 2281 to enjoin Chief Grager's actions on the ground that secs. 176.26 and 176.28 (1), Wis. Stats., were unconstitutional. (A. 102-106.)

Chief Grager answered the first cause of action and moved to separate it from the second cause of action (R. 13-16). A pre-trial conference was held on March 25, 1969, before The Honorable John W. Reynolds, United States District Judge for the Eastern District of Wisconsin (R. 24). At this pre-trial conference, the State of Wisconsin moved to intervene as a defendant in the second cause of action (R. 19-23). The State also moved to separate the two causes of action and it joined with Chief Grager in moving for judgment on the pleadings (R. 25). In its Order following this pre-trial conference, the Court granted the motion of the State of Wisconsin to intervene as a party defendant in the second cause of action (R. 24). The Court also separated the two causes of action and noted that the sole issue for determination of defendants' motion for judgment on the pleadings was whether secs. 176.26 and 176.28 (1), Wis. Stats., were on their face constitutional (R. 25). The Court ordered that this constitutional question should be decided by a three-judge court before the first cause of action was heard. (R. 25).

A hearing on this constitutional question was held before the three-judge panel on June 6, 1969 (A. 115), at which hearing the State of Wisconsin's motion to present witnesses was denied (A. 112; Jurisdictional Statement, 14a-16a). On August 13, 1969, the three-judge court issued its opinion (A. 114-123), United States Senior Circuit Judge Duffy dissenting (A. 120-123), holding that the Wisconsin statutes in question were on their face unconstitutional. The Court entered its order on November 25, 1969 (A. 124). Appellant State of Wisconsin filed its Notice of Appeal to the United States Supreme Court on December 24, 1969. This case was docketed on February 21, 1970 and probable jurisdiction was noted on March 23, 1970.

SUMMARY OF ARGUMENT

Due process is a flexible concept, varying with the time, place and circumstances to which it is being applied. In order to determine the requirements of due process in any given circumstance, the private interest affected should be weighed against the governmental interest involved. *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886 (1961).

Applying this balancing of interests test to the right to purchase alcoholic beverages, the statutes in question satisfy due process without providing for notice and a hearing. Both the majority and the dissenting judge below agree with this conclusion. (A. 117-118, 120-123). The states traditionally have possessed a great police power over alcoholic beverages, while the right of individuals to obtain alcoholic beverages has received little, if any, recognition at law. *Crane v. Campbell,* 245 U.S. 304 (1917).

Matters concerning possible damage to the reputation of an individual posted under these statutes were not before the lower court. Mrs. Constantineau's second cause of action, which was the only one before the lower court, did not allege damage to her reputation, nor did she allege possible reputation damage as a ground for finding these statutes unconstitutional (A. 102-106). Secondly, Mrs. Constantineau's counsel asserted before the lower court only his client's right to obtain alcoholic beverages and her right to procedural due process. United States District Judge Reynolds admitted that this matter of reputation damage "has not been mentioned" (A. 113). The lower court denied the State's attorney's motion to call witnesses (A. 111-112) who could have discussed such matters (Jurisdictional Statement, App. D, 14a-16a).

Even if matters concerning reputation damage were properly before the lower court, that court decided these

matters erroneously because it is unlikely that any such damage would occur from the operation of these statutes. Secondly, matters of reputation have only been considered in terms of due process when any likely damage to reputation has been alleged or shown to be likely to affect the individual's economic future, such as by diminishing his ability to secure future employment. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898-899 (1961). Courts have only so considered reputation damage when specific allegations or evidence were before them that future economic losses were likely to occur. For example, see *Birnbaum v. Trussell*, 371 F. 2d 672, 677-679 (C.A. 2, 1966). No such evidence or allegations of likely future economical loss were before the lower court in this case. When courts have noted that such evidence or allegations of likely future economic loss were not present, they expressly have not considered reputation damage in determining the requirements of due process. *Parker v. Board of Education of Prince George's County, Md.*, 237 F. Supp. 222 (D. Md., 1965), aff'd per curiam, 348 F. 2d 464 (C. A. 4, 1965), cert. denied, 382 U.S. 1030 (1966), rehearing denied 383 U.S. 939 (1966).

In determining the requirements of due process in a given circumstance, consideration must be given to the alternatives available both to the State and to the posted individual. *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 163 (1960) (concurring opinion of Justice Frankfurter). In passing these statutes, the State chose a reasonable and restrained means of achieving a legitimate goal of its police power, namely, that of limiting the noxious effects of excessive drinking by certain individuals. The reasonableness of these statutes is reflected in part by the fact that fifteen other states have similar statutes (Jurisdictional Statement, App. D, 17a-30a). The posted individual has numerous alternatives available to him upon being posted, including seeking judicial review of

the posting official's actions by common law writ of certiorari or bringing an action, such as Mrs. Constantineau's first cause of action (A. 102-106), against the posting official for punitive and compensatory damages. Such an action could be brought either in Federal court or in state court. A posted individual may also have informal remedies against any action taken under the statutes in question either through the issuance of a statement to the press or through political action.

Wisconsin's posting statutes satisfy the requirements of due process upon an application of the *Cafeteria Workers*, supra, balancing of interests test. Recent cases in which this test was applied reveal fact situations in which government action taken without notice and a hearing was upheld even though the private interests involved were more substantial than in this case and/or the government's interests were not as great as in this case. See, for example, *Fugazy Travel Bureau, Inc. v. Civil Aeronautics Board*, 350 F. 2d 733 (C.A., D.C., 1965). Based upon the facts in this case and upon the application of the balancing of interests tests in these recent cases, it follows logically that these statutes also meet the requirements of due process.

The Court should also consider, in determining the requirements of due process in this case, the interest of the State in the economical and practical operation of its everyday affairs. The State should be able to take certain low-level actions which only minimally affect the rights of its private citizens, such as the actions capable of being taken under the statutes in question, without having to provide notice and a hearing.

ARGUMENT

I

THE INTEREST OF THE STATE IN REGULATING ALCOHOLIC BEVERAGES SO OUTWEIGHS THE INTEREST OF THE INDIVIDUAL IN OBTAINING ALCOHOLIC BEVERAGES THAT DUE PROCESS DOES NOT REQUIRE NOTICE AND A HEARING WHEN THE LATTER RIGHT IS WITHDRAWN.

Secs. 176.26 and 176.28 (1), Wisconsin Statutes (A. 116-117) grant to certain local officials the power to make a finding that a person is an excessive drinker and that his [or her] excessive drinking is detrimental to himself, his family, or to the community. The local official, upon making such a finding, may then send a notice to anyone whom he feels ought not sell or give alcoholic beverages to the person found to be an excessive drinker. This notice (see A. 106-107 for the notice utilized in this case) informs its recipients that they are thereafter forbidden to sell or give alcoholic beverages to the person named in the notice. Penalties are set forth for anyone who sells or gives alcoholic beverages to a "posted" person after having received such a notice. While the posted person must receive a copy of the posting notice, notice of intention to post and a hearing are not provided in the statutes. The appellee in this case, Mrs. Norma Grace Constantineau, was posted under the above sections of the Wisconsin statutes. The issue before the Court is whether this statutory scheme of posting provides procedural due process as required by the Fourteenth Amendment to the United States Constitution.

The requirements of due process vary with the circumstances to which the concept is applied.

"... The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. [Citing cases.] ' "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions ....' *Joint Anti-Facist Refugee Committee v. McGrath,* 341 U.S. 123, 162, 163, 95 L.Ed. 817, 848, 849, 71 S.Ct. 624 (concurring opinion).

"As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action...." *Cafeteria & Rest. Wkrs. U., Local 473 v. McElroy,* 367 U.S. 886, 895 (1961).

The precise issue before the Court is whether Wisconsin's alcoholic posting statutes meet the requirements of due process when the interests of the State are weighed against the interests of the posted individual. In *Joint Anti-Facist Refugee Committee v. McGrath,* 341 U.S. 123 (1950), Mr. Justice Frankfurter, concurring, spelled out some of the factors to be considered in determining the requirements of due process in any given circumstance.

"... The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished--these are some of the considerations that must enter into the judicial judgment." (341 U.S. at 163).

It is the position of the State that its alcoholic posting statutes satisfy due process when the governmental interest in regulating alcoholic beverages is weighed against the individual's interest in obtaining such alcoholic beverages.

The states have traditionally possessed a great interest in the regulation of alcoholic beverages, due to their noxious and potentially harmful qualities. The cases are replete with eloquent phrases concerning the evils of liquor and the great powers inherent in the states to regulate such liquors.

> "It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evil shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment." *Crane v. Campbell,* 245 U.S. 304, 307 (1917); *Samuels v. McCurdy,* 267 U.S. 188 (1925); *Crowley v. Christensen,* 137 U.S. 86 (1890).

The great common law interest and power of the states over intoxicating liquors was broadened and increased by the passage of the Twenty-First Amendment to the United States Constitution, which states that:

> "Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Twenty-First Amendment broadened the already great common law regulatory power of the states over intoxicating liquors by enabling the states to regulate in instances in which such regulation might otherwise have been prohibited by the commerce clause (art. I, Sec. 8, U.S. Const.). 30 Am. Jur., *Intoxicating Liquors,* § 44, pp. 556-557; 48 C.J.S., *Intoxicating Liquors,* §33, p. 167.

Similarly, just as the State possesses a great regulatory power and interest over alcoholic beverages, the interest of the individual in obtaining alcoholic beverages traditionally has received little, if any, recognition at law.

> "... The right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge." *Crane v. Campbell,* 245 U.S. 304, 308 (1917); *Samuels v. McCurdy,* 267 U.S. 188, 194-195 (1924).

Upon weighing the power of the State against the liberty of the individual in respect to the matter of obtaining alcoholic beverages, all three members of the lower court agreed that Wisconsin's posting statutes satisfy the requirements of due process. The dissent of Senior Circuit Judge Duffy (A. 120-123) speaks for itself on this point. The majority below similarly showed its agreement:

> "The issue before this court is not whether a State may regulate the sale or gift of liquor to persons who by their excessive drinking misspend their funds so as to expose themselves or their familes to want or their communities to liability for the support of themselves or their families or endanger their own health or the peace and welfare of their communities. The power of a State to regulate the purchase, sale, or gift of intoxicating liquors within its borders is well established. Because of the well-recognized noxious qualities of such liquors and the potential extraordinary evil which may result from their misuse, this police power has been held to encompass absolute prohibition as well as severe restriction. *Ziffrin v. Reeves,* 308 U.S. 132 (1939); *Crane v. Campbell,* 245 U.S. 304 (1917)." (A. 117-118)

For the above reasons, Wisconsin's posting statutes meet the requirements of due process, despite the absence of notice and hearing, when the State's interest in the regulation of alcoholic beverages is weighed against the interest of the individual in obtaining such alcoholic beverages.

II

MATTERS CONCERNING A POSSIBLE EFFECT OF WISCONSIN'S POSTING ~~STATEMENTS~~ STATUTES UPON A POSTED INDIVIDUAL'S RIGHT TO BE FREE FROM PUBLIC DEFAMATION WERE NOT BEFORE THE LOWER COURT.

It was the opinion of the lower court majority that:

> "In the instant case, the private interest affected by the statutes is not only the ability of the plaintiff to purchase alcoholic beverages within the City of Hartford, but also the interest of the plaintiff in not being exposed to unfounded public defamation, embarrassment, and ridicule . . . ." (A. 118)

This issue of possible damage to character or reputation by virtue of the operation of Wisconsin's posting statutes was not before the lower court. Mrs. Constantineau's complaint did not allege any damage to her reputation in her second cause of action in which she sought injunctive relief from the three-judge court below. Mrs. Constantineau's assertion of damages to her reputation is found in paragraph 7 of the first cause of action in her complaint (A. 104-105). She expressly realleged in her second cause of action paragraphs 1-6 of her first cause of action (A. 105). She did not, however, reallege paragraph 7 (A. 105). In her first cause of action Mrs. Constantineau asserts damages to her reputation due to the allegedly malicious actions taken by the defendant Chief of Police under the statutes in question. She does not mention the statutes' potential for damaging reputations as a reason why the statutes are unconstitutional (A. 103-104). Potential damages to reputation were, therefore, not alleged in the cause of action before the court. Those damages to reputation which are alleged in the first cause of action assertedly are due to the malicious and arbitrary

actions of defendant Chief of Police and not to the nature of Wisconsin's posting statutes. In *Sessions v. State of Connecticut,* 293 F.Supp 834 (D. Conn., 1968), aff'd per curiam, 404 F. 2d 342 (C.A. 2, 1968), the court considered plaintiff's interest in his reputation as related to the requirements of due process only after noting (293 F. Supp. at 838) the specific allegations in the complaint asserting damage to his reputation.

Not only did Mrs. Constantineau not allege any damage to reputation before the lower court, but her counsel did not argue such damage to the court (Tr. 3-20, 31-32). He steadfastly argued solely for his client's liberty to purchase alcoholic beverages in the City of Hartford and for her right to procedural due process. Mrs. Constantineau's counsel assumed, in arguing before the lower court, that the defendant Chief of Police had acted properly and according to the standards set forth in the statutes. In such a case, Mrs. Constantineau's substantive interests would not be magnified by a claim of a denial of procedural due process.

> "In addition, where substantive statutory standards have been met--or where there are no such standards--and there is no recognized constitutional infringement, the right to procedural due process will not serve to expand substantive rights." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv.L. Rev. 1439, 1454 (1968).

Counsel for Mrs. Constantineau even argued the need for a further trial on the merits of the first cause of action to determine her claim for damages due to the allegedly arbitrary and malicious actions of the Chief of Police.

> "Mr. Schapiro: . . . We call the court's attention that there is an allegation that the Police Chief acted arbitrarily in bad faith, that he acted willfully and maliciously, and there have been damages. And in that respect, should the Court declare the Statutes un-Constitutional

> or Constitutional, there is still a need for further proceedings in this matter to determine these questions of fact, because should this Court hold the law to be valid, nevertheless if there is an arbitrary act or willful act and damages resulting, we nevertheless have stated a cause of action under the Civil Rights Act, even if the law is valid." (Tr. 19)

It is because of the allegedly arbitrary action attributed to the Chief of Police in the first cause of action that Mrs. Constantineau alleges damage to her reputation and not because of the terms of the statute on its face.

Secondly, Mr. Southwick, the attorney for the State of Wisconsin at the hearing before the lower court, had subpoenaed Mrs. Constantineau to appear at that hearing and had secured the attendance of the Chief of Police of Hartford, Wisconsin (Jurisdictional Statement, App. D, 14a-16a). Mr. Southwick then attempted to call these two persons as witnesses (A. 111-112) for the purpose of giving the court an example of the operation of the posting statutes (Jurisdictional Statement, App. D, 14a). The lower court could then have inquired into the nature of any possible damage to reputation which might be incurred by operation of Wisconsin's posting statutes. The lower court refused to allow any witnesses to be called (A. 112).

U. S. District Judge Reynolds then questioned Mr. Southwick as to the possibility of damage to reputation to one posted under the Wisconsin Statutes (A. 112-114). Judge Reynolds asked:

> "I don't think I am as much concerned about whether or not you can get a drink, go from Hartford to Hartland or some other community, but the fact of being held up to ridicule for reasons which the party may not have any–may not know why. I think this is the right *which has not been mentioned* which bothers me more than–because even during prohibition, everyone [sic] could get a drink, so that's not the problem. (Emphasis added)

". . . .

"I want your personal opinion. Does that seem fair to you?

"Mr. Southwick: It seems fair to me. I think the requirements of due process have been met, Your Honor." (A. 113)

At no place, except during the discussion between U. S. District Judge Reynolds and Mr. Southwick, was the potential for damage to reputation due to the operation of Wisconsin's posting statutes ever mentioned. The trial of the first cause of action which contained Mrs. Constantineau's only assertion of damage to reputation was still pending as U. S. District Judge Reynolds decided to hear the second cause of action involving the constitutional question first (R. 25). U. S. Senior Circuit Judge Duffy never mentioned the question of potential damage to reputation to a posted individual in his dissenting opinion in the lower court (A. 120-123). Despite all of the above, the majority of the lower court concluded:

> "In 'posting' an individual, the particular city official or spouse is doing more than denying him the ability to purchase alcoholic beverages within the city limits. In essense, he is giving notice to the public that he had found the particular individual's behavior to fall within one of the categories enumerated in the statutes. It would be naive not to recognize that such 'posting' or characterization of an individual will expose him to public embarrassment and ridicule, ..." (A. 119)

Neither the State nor Mrs. Constantineau had any notice that matters of potential damage to reputation were before the lower court. Neither party argued these matters nor did either party have notice that such matters would be dispositive of the constitutionality of Wisconsin's posting statutes.

For the above reasons, matters of potential damage to reputation to an individual posted under Wisconsin's posting statutes were not before the lower court. Consequently, the lower court was merely conjecturing when it concluded that

a posted individual's reputation would be affected by a proper application of the statutes.

III

EVEN IF MATTERS CONCERNING POSSIBLE DAMAGE TO REPUTATION OF POSTED PERSONS DUE TO THE OPERATION OF WISCONSIN'S POSTING STATUTES WERE PROPERLY BEFORE THE LOWER COURT, THAT COURT DECIDED THESE MATTERS ERRONEOUSLY.

Possible damage to character and reputation is a proper matter to consider in balancing private interests against governmental interests for the purpose of determining the requirements of due process. *Wiemann v. Updegraff*, 344 U.S. 183 (1952); *Slochower v. Board of Higher Education of City of New York*, 350 U.S. 551 (1956); *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Birnbaum v. Trussell*, 371 F. 2d 672, 677-679 (C. A. 2, 1966); *Hosack v. Smiley*, 276 F. Supp. 876 (D. Colo., 1967), aff'd per curiam, 390 U.S. 744 (1968).

Such matters of character and reputation have only been considered in connection with the requirements of due process when the potential damage to reputation has been likely to affect the individual's future in an economic sense, such as by affecting his ability to secure employment in the future or his ability to practice a given profession. The individual's interest in protecting his character and reputation is important, in terms of the requirements of due process, as it relates to the economic alternatives remaining to him after the government action in question. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898-899 (1961); *United States v. Lovett*, 328 U.S. 303, 314 (1946); *Schware v. Board of Bar Examiners*,

353 U.S. 232, 238-239 (1967); *Birnbaum v. Trussell*, 372 F. 2d 672, 677-679 (C. A. 2, 1966); *Parker v. Lester*, 227 F. 2d 708 (C. A. 9, 1955), aff'd on rehearing 235 F. Supp. 887 (1956); *Meredith v. Allen County War Memorial Commission*, 397 F. 2d 33, 36 (C.A. 6, 1968); *Heckler v. Shepard*, 243 F. Supp. 841, 847 (E. D. Idaho, 1965).

While it is unlikely that a posted individual's reputation would be damaged by the proper application of Wisconsin's posting statutes, it is even more unlikely that any such possible damage to reputation would specifically damage his future economic opportunities. The statutes merely state that when a specified local official makes a finding that an individual has by excessive drinking (1) misspent or wasted his estate so as to expose himself or his family to want, or the community to which he belongs to liability for the support of himself or his family, or (2) has injured or endangered the loss of his health, or (3) has endangered the personal safety of any other person or (4) has endangered the security of the property of any other person, or (5) has become dangerous to the peace of any community, then that official may send a notice forbidding persons within or without his jurisdiction to whom the posted individual may resort for alcoholic beverages from transferring such beverages to the posted individual. The notice provided for in the statutes is a writing which simply states that the addressee is forbidden to transfer alcoholic beverages to the individual named in the notice. Nothing further is stated in the notice. (See A. 116-117 for the terms of the statutes and A. 106-107 for the notice utilized in the instant case.)

Any damage due to loss of reputation that a posted individual might suffer due to the operation of these statutes is far more speculative and less concrete than the evidence of impending economic loss which was present in those cases in

which potential reputation loss was considered in determining the requirements of due process.

Extreme and immediate economic deprivation was present in some cases in which it was held that due process required a hearing, as, for example, the case of the individual who is denied or deprived of a license to practice his chosen profession, *Schware v. Bd. of Bar Examiners*, 353 U.S. 237 (1957) (lawyer); or the case where certain public employees were barred from future governmental employment by an Act of Congress specifically directing that public funds could not be paid to them, *United States v. Lovett*, 328 U.S. 303 (1946); or, in a recent case involving the right to a preliminary hearing, a welfare recipient's interest in "the very means by which to live . . . the means for daily subsistence." *Goldberg v. Kelly*, 38 Law Week 4223, 4225 (1970). In many less extreme situations yet with concrete evidence that future economic loss was likely to occur, the courts have found an interest in reputation cognizable in the due process balancing process of *Cafeteria Workers*, 367 U.S. 886 (1961).

In many less extreme situations, the courts have considered the plaintiff's interest in his reputation only after he has set forth definite reasons why his economic future would also be affected. For example, in *Birnbaum v. Trussell*, 371 F. 2d 672 (C.A. 2, 1966), the Court, Anderson, J., held that the interests of plaintiff physician were sufficiently great that due process required that he be given a hearing on the reasonableness of his dismissal from a public hospital staff on the grounds that he was racially prejudiced. Plaintiff alleged concrete evidence that his reputation and future employment opportunities were affected by the actions of defendant: he had been dismissed without a hearing from the staff of a public hospital in the midst of a controversy involving his treatment of Negro hospital workers; the defendant dismissing officers sent a letter to all

other municipal hospitals in the City instructing them not to place the plaintiff on their staffs, giving the accusations against plaintiff "a stamp of official authority" (371 F. 2d at 677) by the City Department of Hospitals; defendant president of the union of hospital workers of which the Negro workers were members "let it be known that they had secured his removal and continued, as part of a campaign to increase the membership of the union, to accuse him of abusing Negros." (371 F. 2d at 675-676) The court noted that:

> ". . . the courts have become more inclined to consider the causes of discharge and the methods and procedures by which a dismissal is effected as it may bear upon reputation and the opportunity for employment thereafter. It is quite clear that, in the circumstances surrounding Doctor Birnbaum's removal from office, more was involved than merely the loss of the privilege of public employment . . . ." (371 F. 2d at 677).

Similarly, in *Meridith v. Allen County War Memorial Hospital Commission,* 397 F. 2d 33 (C.A. 6, 1968), the Court, McCree, J., considered the potential damage to plaintiff physician's reputation in determining the requirements of due process. Plaintiff was discharged from the only hospital in the County on the basis of letters written by five other staff doctors alleging his general uncooperativeness, his refusal to handle emergency cases and his dismissal from various medical associations. The Court, citing *Cafeteria Workers,* supra, and *Birnbaum v. Trussell,* supra, found that plaintiff had a due process right to a fair hearing because:

> ". . . there appears to be a substantial likelihood that failure to reappoint plaintiff would foreclose him from practicing his profession, both because of the limited number of available hospitals in the area and because of the stigma which would result from a dismissal on the grounds mentioned in the letters of defendant physicians . . . ." (397 F. 2d at 36).

In *Olson v. Regents of University of Minnesota*, 301 F. Supp. 1356 (D. Minn. 1969) in which a 59 year old state employee with 14 years on the job was held to be entitled to a hearing upon being discharged for physically attacking his fellow employees, the Court, Neville, J., found that:

> "... His chances for employment elsewhere are therefore minimal after his discharge by the University ...." (301 F. Supp. at 1363).

In *Lucia v. Duggan*, 303 F. Supp. 112 (D. Mass. 1969), plaintiff school teacher's numerous inquiries to secure re-employment as a teacher, most of which were simply not answered, caused the Court, Garrity, J., to conclude that it was "fairly inferable" (303 F. Supp. at 116) that he would be unable to continue to be a school teacher. In *Endler v. Schultzbank*, 68 C. 2d 162, 436 P. 2d 297 (1968), defendant Commissioner of Corporations directed all of his licensees not to hire plaintiff finance company officer under pain of losing their licenses. Because finance companies were required to be licensed, the Supreme Court of California, Tobriner, J., found that defendant's actions had made it impossible for plaintiff to secure employment in California in the finance business. In *Parker v. Lester*, 227 F. 2d 708 (C. A. 9, 1955), plaintiff seamen, denied security clearances which were necessary for employment on merchant vessels, were found to be effectively barred from practicing their trade in the future.

While due process may require a hearing upon a concrete showing of the potential for future employment loss, the lack of such evidence has been considered (absent the loss of other significant rights) in determining that notice and hearing are not required by due process. Thus, in *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), plaintiff was a short order cook on a military reservation and was denied a security clearance, thereby rendering her ineligible to enter the base where she was employed. The Court, Stewart, Justice, found:

> "Finally, it is to be noted that this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity. [Citing cases] . . . There is nothing to indicate that this determination would in any way impair Rachel Brawner's employment opportunities anywhere else. . . ." (367 U.S. 898-899).

In *Freeman v. Gould Special School District of Lincoln County, Arkansas,* 405 F. 2d 1153 (C. A. 8, 1969), cert. denied 396 U.S. 843 (1969), plaintiff school teachers were fired for failing to cooperate with the school principal. The school board had offered to rehire them if they could resolve their differences with the principal. No allegation was made of any possible loss of future employment and the Court, Gibson, J., found (405 F. 2d 1160) that plaintiffs were only asserting a right to specific employment at the school where they had been working. In finding (405 F. 2d 1160) that the school board was not required to give plaintiffs a hearing, the Court noted that:

> ". . . Absent statutory or contractual requirements, persons discharged for inefficiency, incompetency, or insubordination have no constitutional right to a hearing with rights of cross examination and confrontation of witnesses." (405 F. 2d 1161).

In *Chafin v. Pratt,* 358 F. 2d 349 (C.A. 5, 1966), cert. denied, 385 U.S. 878 (1966), plaintiff was involuntarily retired without notice or a hearing from her position with the Federal government. She was retired because she had been found to be mentally unfit for her job on the basis of *intra*office memoranda and reports and the confidential report of a psychiatrist who had examined her. In upholding the validity of her retirement against plaintiff's due process challenge, the Court, Brown, J., noted that "When we similarly [to *Cafeteria Workers v. McElroy,* supra] weigh the competing interests in this case, it is clear that no hearing was required. Appellant has not lost

the right to work elsewhere as a secretary. . . ." (358 F. 2d at 357). In *Parker v. Board of Education of Prince George's County, Md.*, 237 F. Supp. 222 (D. Md., 1965), aff'd per curiam, 348 F. 2d 464 (C.A. 4, 1965), cert denied 382 U.S. 1030 (1966), rehearing denied, 383 U.S. 939 (1966), plaintiff probationary school teacher's employment contract was not renewed allegedly because plaintiff had assigned his pupils a book thought by defendant school board to be objectionable. Plaintiff asserted that defendant's failure to renew his contract without notice and a hearing violated his right to due process. In upholding the actions of the school board, the Court, Thomsen, C. J., citing *Cafeteria Workers v. McElroy*, supra, said that "In the instant case the termination of plaintiff's contract denied him only the right to work in the public schools of one of the counties in Maryland. It did not destroy his legal right to pursue his profession elsewhere in the State, or in any other state, or even in a private school in Prince George's County." (237 F. Supp. at 228).

For the above reasons and because of the above cases, even if matters concerning possible damage to reputation due to the operation of Wisconsin's posting statutes were properly before the lower court, that court decided these matters erroneously.

IV

A CONSIDERATION OF THE ALTERNATIVES AVAILABLE BOTH TO THE STATE AND TO THE POSTED INDIVIDUAL IS RELEVANT IN DETERMINING THE REQUIREMENTS OF DUE PROCESS

The preceding sections have dealt with the lack of damage to a posted individual's economic alternatives after he was posted in accordance with the statutes in question. It is also relevant to a consideration of the requirements of due process to

look at the reasonableness of the means chosen by the State to obtain a legitimate goal of its police power, namely, that of limiting the noxious effects caused by the excessive drinking of alcoholic beverages by individuals. It is also relevant to look at the alternative means of review and relief available to the posted individual from actions taken under these statutes.

The goal of the State in passing the posting statutes was to limit the noxious effects that excessive drinking can have upon the drinker, his family or upon the community within which he resides. The statutes vest posting authority in local persons and officials because they are in the best position to be aware of what is essentially a local problem. Also, the statutes provide adequate standards to guide the actions of the posting official or person. Secondly, the statutes place prohibitions and penalties only upon those serving the excessive drinker, and not upon the drinker himself. No prohibitions are placed upon the attempted purchase of alcoholic beverages by any posted person, although such prohibitions are provided for in the statutes of some other states (see sec. 202.100 (2), Revised Statutes of Nevada; Jurisdictional Statement, 23a). Only those persons receiving the notice are barred from transferring alcoholic beverages to the posted individual. The statutes represent a reasonable and restrained method for the State to meet a valid objective of its police powers, namely, the control of the noxious effects of excessive drinking by individuals. The reasonableness of this method utilized by Wisconsin to control this serious social problem is highlighted by the fact that fifteen other states employ virtually the same method found in the statutes in question. (See Jurisdictional Statement, App. E, 17a-30a.)

It is also relevant to a determination of the requirements of due process to consider the alternatives remaining to the posted individual. The statutes withdraw for one year the liberty

of the posted individual to obtain alcoholic beverages from persons or establishments receiving the requisite notice of posting. The posted individual is, however, free to consume alcoholic beverages purchased prior to the posting, or received from persons or establishments which have not been sent the posting notice, or obtained in other states. Thus, the liberty of the posted individual to consume alcoholic beverages has only been limited and has not been withdrawn completely. Alternative means of obtaining alcoholic beverages, albeit possibly impractical ones, are available to the posted individual.

A person who has been posted under the statutes in question has numerous alternatives to any arbitrary posting done by a local official not acting in good faith. The individual may have an action at law in Federal court (28 U.S.C. §1343 (3); 42 U.S.C. §1983) as Mrs. Constantineau has asserted in her first cause of action (A. 102-106). Such an action could demand punitive and compensatory damages due to any arbitrary and malicious actions taken pursuant to the posting statutes (A. 105-106). A posted individual could also bring an action in the state courts for damages against any local official empowered under the posting statutes, whether he was acting arbitrarily or in good faith. *Holytz v. City of Milwaukee,* 17 Wis. 2d 26, 115 N.W. 618 (1962). In *Sessions v. State of Connecticut,* 293 F. Supp. 834, 838 (D. Conn., 1968), aff'd per curiam, 404 F. 2d 342 (C.A. 2, 1968), the Court, Clarie, J., noted that:

> ". . . whatever interests he had in his employment which were entitled to legal protection, e.g., reputation and vested pension rights, could still be safeguarded against arbitrary state action by a proper remedy in the state courts. All that the Personnel Appeal Board could finally adjudicate was whether or not the petitioner was entitled to remain in the public employ. . . ."

In Wisconsin, a local unit of government is obligated to pay any judgments obtained against its officials for actions taken by them in good faith. Sec. 270.58, Wis. Stats.

A further remedy available to an individual posted under the statutes in question lies in the fact that he could seek judicial review of the reasonableness of the official's actions by writ of certiorari. *Wurth v. Affeldt,* 265 Wis. 119, 126, 60 N.W. 2d 708 (1953). By such a review by a common-law writ of certiorari, a posted individual could challenge the actions of a local official in posting him on the grounds that such action was arbitrary, oppressive, unreasonable, or that the evidence was not sufficient to justify his actions. *State ex rel. Ball v. McPhee,* 6 Wis. 2d 190, 199-200, 94 N.W. 2d 711 (1958); *State ex rel. Progresso Development Company v. Wisconsin Real Estate Broker's Board,* 202 Wis. 155, 168, 231 N.W. 628 (1930). The Court in *Sessions v. Connecticut,* 293 F. Supp 834 (D. Conn., 1968), aff'd per curiam, 404 F. 2d (C.A. 2, 1968), in considering the requirements of due process, noted that the plaintiff could have sought review of the dismissing agency's actions by writ of mandamus.

> "It should be noted also, that while the findings of the Appeal Board are unreviewable, an aggrieved party does have the remedy of mandamus available, to insure against the board's acting illegally or arbitrarily." (293 F. Supp. 839)

If a posted individual's sole reason for desiring a hearing were to present his or her side of the case for public consumption, this objective could be served by issuing a statement to the press. *Hosack v. Smiley,* 276 F. Supp. 876, 881 (D. Colo., 1967), aff'd per curiam, 390 U.S. 744 (1968).

Finally, since all of the officials given posting powers under these statutes are elected officials, with the exception of the chief of police and the county superintendent of the poor

[welfare department], the latter two officials serving at the pleasure of elected officials, a posted individual may have some political recourse against the official posting him.

Thus, while few alternative means other than the one represented by the statutes in question were available to the State to achieve its legitimate objective, namely, limiting the noxious effects of excessive drinking by certain individuals, posted individuals do have numerous legal, non-legal and political remedies available to them upon being posted. These alternatives must be considered in determining whether the statutes in question satisfy the requirements of due process.

V

WISCONSIN'S ALCOHOLIC POSTING STATUTES SATISFY THE REQUIREMENTS OF DUE PROCESS WHEN THE INTERESTS OF THE STATE ARE BALANCED AGAINST THE INTERESTS OF THE POSTED INDIVIDUAL

In order to determine whether due process requires notice and a hearing in the instance where an individual is posted under Wisconsin's posting statutes, it is necessary to weigh the interests of the State against the interests of the posted individual. These interests have been analyzed in the preceding discussion. However, it is also relevant to view recent cases in which the balancing of interests test was employed. These cases reveal instances in which private interests far more significant than the interests of individuals posted under these statutes were validly withdrawn without notice and a hearing. These cases also reveal instances in which no notice and hearing were required despite the fact that the governmental interests involved were not as great as the State's interest in this case in controlling the noxious effects of excessive drinking.

In *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), plaintiff Rachel Brawner had been employed as a short-order cook for more than six years in a cafeteria operated by her employer on the premises of a military base. Her employer had been entirely satisfied with her employment performance. The Court by Stewart, Justice, in effect held that plaintiff's right to continue in this job could be withdrawn without notice and a hearing when it upheld the base commander's withdrawal, without notice and a hearing, of plaintiff's identification badge, without which she could not enter the base.

Government action which serves to increase substantially the competition which a business is subjected to may be taken by the government without notice and a hearing. In *Law Motor Freight, Inc. v. Civil Aeronautics Board,* 364 F. 2d 139 (C.A. 1, 1966) cert. denied, 387 U.S. 905 (1967), defendant board's order, promulgated without granting plaintiff business a hearing, served to increase substantially the competition to plaintiff's motor freight carrying business. The Court, Coffin, J., in denying plaintiff's due process claim for a hearing, cited *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), in addressing itself to the question of "whether such vital rights to life, liberty, or property were involved as to invoke the constitutional due process mandate for a hearing." (364 F. 2d 144.) In *Fugazy Travel Bureau, Inc. v. Civil Aeronautics Board,* 350 F. 2d 733 (C.A., D. C., 1965), the Court, Tamm, J., upheld an agreement made between defendant board and the scheduled airlines which required plaintiff travel agency to substantially amend its business and accounting procedures. The Court cited *Cafeteria Workers v. McElroy,* supra, and applied its balancing test in determining that due process did not require the granting of a hearing to plaintiff, despite plaintiff's claims that the plan would "drive it out of business . . . ." (350 F. 2d 737) In *Continental Bank v. National City Bank,* 245 F.

Supp. 691 (E.D. Ohio, 1965), the National City Bank made an application to defendant Comptroller of Currency for permission to establish a branch directly across the street from plaintiff Continental Bank, thereby greatly increasing the competition faced by Continental Bank. The Court, Battisti, J., after applying the balancing test to determine the requirements of due process, held that Continental Bank's right to be free from economic competition was not a sufficiently great right to entitle it to a hearing on the matter of National City Bank's application.

In *Rose v. Haskins,* 388 F. 2d 91 (C.A. 6, 1968), cert. denied, 392 U.S. 946 (1968), the plaintiff parollee was held not entitled to a hearing prior to the revocation by defendant of his parole for violations of the conditions of that parole. Despite the fact that defendant's actions resulted in plaintiff's return to prison, the Court, Weick, C.J., held that plaintiff was not entitled to a hearing.

Also, as discussed previously, a public employee may be discharged without notice and a hearing from his job, as long as the conditions of his discharge do not affect his future employment possibilities. *Cafeteria Workers v. McElroy,* 367 U.S. 886, 896-898 (1961).

The rights affected in the above cases are far more substantial and significant in nature than those rights of a posted individual which are affected by the operation of Wisconsin's posting statutes. Despite this fact, those significant economic and personal rights involved in the above cases were held to have been validly withdrawn from their holders by government action taken without a hearing. It follows logically that those rights of an individual which may be affected by operation of the statutes in question should also be able to be withdrawn validly without notice and a hearing.

Furthermore, in *Lewis v. City of Grand Rapids*, 356 F. 2d 276 (C.A. 6, 1966), cert. denied, 385 U.S. 838 (1966), the Court, O'Sullivan, J., seemed to imply that, in terms of the requirements of due process, there was a distinction between economic interests, such as those interests which were withdrawn in the above-cited cases, and those interests associated with traffic in intoxicating liquors.

> "The United States Supreme Court, in recent decisions, has been exacting in its requirements of due process before a state agency may deny entrance of citizens into the practice of a profession or other calling, such as the practice of law, [citing cases] . . . . None of these decisions, however, can be read to control the case of an application for transfer of a liquor license. The traditional municipal interests in regulating the liquor business, together with the problems of conducting this regulation through competent, civic-minded, part-time officials, require the use of flexible procedures. . . ." (356 F. 2d at 286)

A review of recent cases utilizing the balancing test of *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), to determine the requirements of due process, indicates that a hearing was held not to have been required in many instances where the private interests withdrawn were more substantial in nature than those interests of an individual which may be affected by operation of the statutes in question. Therefore, both upon an application of the balancing test itself, and upon a comparison of the rights of an individual which may be affected by operation of Wisconsin's posting statutes with those rights which have been held to have been withdrawn validly without the granting of notice and a hearing, reason compels one to conclude that the requirements of due process have been met by the terms of Wisconsin's posting statutes.

VI

THE STATE HAS AN INTEREST IN ECONOMY AND IN THE SMOOTH, PRACTICAL OPERATION OF ITS EVERYDAY AFFAIRS, AND THIS INTEREST WOULD BE ADVERSELY AFFECTED BY REQUIRING A HEARING FOR EVERY GOVERNMENTAL ACTION TAKEN WHICH AFFECTS A PRIVATE RIGHT, HOWEVER MINIMAL THAT RIGHT MAY BE

The State has a definite interest in being able to take some low-level actions, such as actions taken under the statutes in question, without having to hold a hearing. The everyday, practical operations of government will be greatly disrupted and the costs of government will be greatly increased if a hearing must be held in conjunction with every action which it takes. The State has a definite interest in the smooth operation of its everyday activities and in the economy of its operations, and this interest should be considered by the Court in applying the due process balancing test. In *Sessions v. State of Connecticut*, 293 F. Supp. 834 (D. Conn., 1968), aff'd. per curiam, 404 F. 2d. 344 (1968), the Court, Clarie, J., in speaking of the requirement of a formal, judicial-type hearing, made a statement which is relevant here.

> " 'The Court has consistently recognized that * * * the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.' *Cafeteria and Restaurant Workers Union Local 473, AFL-CIO v. McElroy* [supra].
>
> "Were the law otherwise, the employment status of any governmental employee could not be terminated without subjecting the employer to a protracted judicial

hearing. This would impose a prohibitive burden on the employer and result in a substantial reduction in government work production standards. Administrators would generally accept an inferior service, rather than be subjected to the rigors of a judicial hearing, where evidential proof would be required to justify their administrative personnel decisions." (293 F. Supp. 837-838).

This same point was discussed in more depth in Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1453-1454 (1968):

". . . On the other hand, as matters currently stand, constitutional claims to procedural due process in the public sector are not absolute, and even important private interests can still be taken away without an adequate hearing. It is as yet unclear whether the doctrine of unconstitutional conditions will import a right to procedural due process in all cases or only when the administrative decision rests prima facie on some basis violative of an explicit collateral right (such as freedom of speech); if the more limited view is adopted, the doctrine itself would be insufficient to establish procedural safeguards against decisions which are wholly unreasonable but do not imperil such explicit rights.

"Moreover, the additional benefits to be gained even from an absolute right to procedural due process are limited. Although the right to some form of process may be absolute, the extent to which particular safeguards are available nonetheless varies according to the circumstances. Where the consequence of error is relatively insubstantial, protection against the risk of error through the use of elaborate quasi-judicial procedures is subject to a constitutional trade-off with the need for administrative and fiscal economy. A student who stands in peril of outright expulsion, just as a job applicant need not receive the same type of circumspect hearing as a long-time employee whose employment alternatives have dwindled away and who is faced with the threat of discharge. In addition,

where substantive statutory standards have been met--or where there are no such standards--and there is no recognized constitutional infringement, the right to procedural due process will not serve to expand substantive rights . . . ." [The writer then concluded that "a right to procedural is desirable" (p 1454)].

The Court should consider this additional interest of the State in being able to run smoothly and economically its everyday operations. Many of the routine operations of the State may affect some minimal private rights of citizens, such as those rights which are affected by the operation of these posting statutes, and the State should be able to conduct such operations without having to undergo the inconvenience and expense of providing notice and a hearing.

The Court should remember, after all, that "It cannot be contended either that due process *never* requires notice, a hearing, a confrontation, and right to cross examine, or that it *always* requires such procedure." *Murray v. Vaughn*, 300 F. Supp. 688, 706 (D. R.I., 1969) (Pettine, J.).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the United States District Court for the Eastern District of Wisconsin should be reversed.

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May, 1970

FILE COPY

No. ~~1221~~ 95

In the
Supreme Court of the United States
OCTOBER TERM, 1969

STATE OF WISCONSIN,
Appellant,

vs.

NORMA GRACE CONSTANTINEAU,
Appellee.

On Appeal From The United States District Court
For The Eastern District of Wisconsin

BRIEF FOR THE APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1211

STATE OF WISCONSIN,

Appellant

vs.

NORMA GRACE CONSTANTINEAU,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLEE

JURISDICTION

The appellee commenced the action below under 42 U.S.C. 1983 and 28 U.S.C. 1343, alleging damages due to the deprivation of rights guaranteed her by the United States Constitution, and further sought injunctive relief under sec. 28 U.S.C. 2281 and 2284 to enjoin the actions of defendant Grager taken by him under the statutes herein involved; namely, Wisconsin Statutes sec. 176.26 and 176.28. The United States Supreme Court has jurisdiction to review the decision

of the 3 Judge District Court by direct appeal pursuant to 28 U.S.C. 1253 and 2102(b). Probable jurisdiction was noted on March 23, 1970.

QUESTIONS PRESENTED

1. Does a citizen have a right to maintain his or her reputation free from State infringement, and if so, is this a basic, fundamental right that is constitutionally protected, or is that right of a non-constitutional nature that may be taken from her by State action?

2. If that right of the citizen to maintain her reputation free from state infringement is not a basic, fundamental right that is constitutionally protected, can the state infringe or disparge that right without the customary notice and hearing requirements of the procedural due process safeguards of the 14th Amendment, Sec. 1, of the Federal Constitution?

3. If the right of a citizen to maintain her reputation free from state infringement is not a basic, fundamental right that is constitutionally protected, can the state infringe that right when it is joined with the admittedly non-constitutionally protected right to receive and use alcoholic beverages, without notice and hearing of such intended state action?

SUMMARY OF ARGUMENT

Every citizen of a free society has various rights of both a constitutional nature which may never be abridged under any circumstances (e.g., the right to bail, the right to a free exercise of religion) and others of a non constitutional nature which he possesses as a member of such society but which, when proper safeguards in proper proceedings are applied, may be removed or restricted from him (e.g. the right to use the highways; the right to go to school), such safeguards and proceedings being based in the due process concept. In the case on appeal, appellee's position is that every citizen has a basic fundamental right, emanating from the Bill of Rights and enforceable against State action by the 14th Amendment Due Process Clause, to maintain his or her reputation free of State infringement, which right, although not expressly stated in the Bill of Rights, is to be read therein by implication to give meaning to the express guarantees therein, and that such right is a necessary ingredient for the concept of ordered liberty in a free society. Griswold v. Connecticutt (1965), 381 U.S. 479, 85 S. Ct. 1678, 14 L ed 2d 510.

The right to use and receive alcoholic beverages, appellee admits, has no constitutional source, but that such right, when coupled with another right, the right of the citizen to maintain her reputation free from state infringement, (even if such right is deemed not to be such a fundamental right as can not be infringed upon by the State under any circumstances) or even without such other, and more valuable right, cannot be removed from appellee without giving her the chance to be advised of the reasons

for such contemplated revocation, and permitting her to face and cross examine her accusers. The operation of the statutes in question by acting against these dual rights of the citizen, causes an overwhelming preponderence in favor of the interest of the citizen affected and against the State function and interest results under the test of Cafeteria & Restaurant Workers v. McElroy (1961) 367 U.S. 886, 81 S. Ct. 1743 6 L.ed 2d 1230, wherein the question of injury to the citizen's reputation is so inextricably intertwined with the question of the citizen's other rights under the statutes herein involved, as to be impossible to be excluded from a fair consideration of the issues presented.

ARGUMENT

I.

EVERY CITIZEN HAS A BASIC, FUNDAMENTAL RIGHT OF MAINTAINING HIS OR HER REPUTATION FREE FROM STATE INFRINGEMENT, WHICH RIGHT IS CONSTITUTIONALLY PROTECTED.

Although no mention is expressly made in the Constitution or in the Bill of Rights concerning the right of a citizen to his or her reputation and the bar of the State from infringing or injuring the same, Appellee's basic position is that such right, with such protection against State action attached therewith, is a vital element of the concept of ordered liberty, protected against state action by the due process clause of the 14th amendment, and that no action of the type herein sanctioned under the objected to statutes could be justified even with notice and a hearing. See Griswold v. Connecticutt (1965), 381 U.S. 479, 85 S. Ct. 1678, 14 L.ed 2d 510 and Aptheker v. Secretary of State, (1964), 378 U.S. 500, 84 S. Ct. 1659, 12 L. ed 2d 992, referring to other constitutional rights of a fundamental nature, not expressly stated in the Bill of Rights or Constitution, but by implication read therein as necessary to make the stated guarantees meaningful. Basically, the right of a citizen to his or her reputation and the protection of the same from State action is basic and essential to the extent that any action against the said right by the State causes an immediate withering of the citizen's other well established constitutional rights. Action by the state against the name and reputation of the citizen, for instance, in the objected to statutes, prods other citizens to disassociate

from the posted individual by her tacitly being denied admission to certain public places where her name appears, where such other individuals are forbidden to deal with her, and further extends to such other private areas where the citizen could receive the beverages in a similiar manner, thus infringing on the posted citizen's right of free association, guaranteed to her under the first amendment. N.A.A.C.P. v. Buttons, (1963), 371 U.S. 415, 83 S. Ct. 328, 9 L. ed 2d 405; Shelton v. Tucker (1960), 364 U.S. 479, 81 S. Ct. 247, 5 L. ed 2d 231. The public display of her appellation with innuendos therewith referring to intempered personal habits invades the citizen's peace of mind and, consequently, her right of privacy, guaranteed her under the 9th amendment. Griswold v. Connecticutt (1965), 381 U.S. 479, 85 S. Ct. 1678, 14 L. ed 2d 510; Fairfield v. American Photocopy Equipment Co. (1955 Cal. App.), 291 P2d 194, 138 Cal. App. 82. Although the foregoing examples of damages accruing to appellee in the form of infringement of other recognized constitutional rights, from the operation of the objected to statutes herein is thus seen, it is brought out by appellee not merely to show the invalidity of these statutes under the aforesaid constitutional protections applied against the States by the due process clause of the 14th amendment, but to further show that the interest of a citizen in the maintenance of her reputation is of such an essential and basic nature that it should be read by implication into the Bill of Rights so as to be unabridgeable by State action via the 14th amendment bar. Although the United States Supreme Court has never explicitly stated that the right of a citizen to maintain her reputation free from State action is a constitutionally protected right emanating from the Bill of Rights and the

14th amendment, in Rosenblatt v. Baer (1965), 383 U.S. 75 86 S. Ct. 669, 15 L. ed 2d 597, said right was recognized, howbeit not specifically of a constitutionally based nature: (p. 92):

> "It is a fallacy, however, to assume that the first amendment is the only guidepost in the area of state defamation laws. It is not. As the Court says, "important social values...underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.
>
> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the 9th and 10th amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basis of our constitutional system." (Concurring opinion).

See also 53 C.J.S. Libel and Slander, sec. 4, p. 39. The tacit recognition of the right of maintaining and keeping one's reputation though not applied to state action in Rosenblatt, supra, nor explicitly stated to have constitutional sources to make it unabridgeable by State action, nevertheless indicates said right is of a basic nature that pertains to the social, legal and economic benefit of each member of society, Griswold v. Connecticutt (1965), 381 U.S. 479, 85 S. Ct. 1678, 14 L. ed 2d 510, and from an examina-

tion of the traditions and collective conscience of our people, such right of keeping and maintaining one's reputation free from state infringement is so rooted therein to be ranked as fundamental. See Concurring opinion of Justice Goldberg in Griswold, supra. In Kennedy v. Item Co. (1948), 213 La. 347, 34 S2d 886, 890 it was noted:

> "The very foundation upon which the law of libel is laid is the protection of reputation. The right to a good name and fame is as absolute and essential to the "pursuit of happiness" as is the right to life and liberty, characterized in our Declaration of Independence as among those "inalienable rights which all men, being created equal, are endowed by their creator."

See also Marion v. Davis (1927), 217 Ala. 16, 114 S. 357. In pleading that the action of the chief of police violated appellee's constitutional rights, appellee made specific reference to her rights under the 14th and 9th amendment (App. 103-4). However, the right of maintaining one's reputation free from State infringement could rest in the due process clause of the 14th amendment alone, in the 9th amendment imposed upon the states by the 14th amendment due process clause, or in the 1st amendment due process clause, all of which have been espoused in Griswold v. Connecticutt, supra.

Appellee notes the wide privilege granted to critics of both public figures and public officials to protect the said critics from restrictions otherwise imposable against them under libel laws, in order to foster freedom of the press, free speech and free discussion. New

York Times v. Sullivan, (1964), 376 U.S. 254, 84 S. Ct. 710, 11 L. ed 2d 686, 95 A.L.R. 2d 1412, Curtis Publishing Co. v. Butts, (1967), 388 U.S. 130, 87 S. Ct. 195, 18 L. ed 2d 1094, reh. den/ 389 U.S. 889, 88 S. Ct. 11, 19 L. ed 2d 197. However, the reverse should not be held valid when public officials criticize or use their position to bring the name or reputation of the private citizen into ridicule. The need for "breathing room" for free speech and discussion is absent in the latter case, and, in its place is the need of the private citizen not to be the subject of official scrutiny, public example, shame and other outworn concepts, that cause injury to reputation and name.

Such vital interest of the citizen in his reputation must be of the fundamental nature to be ranked and included within those basic concepts whose existence must be read into the Bill of Rights in order to make the express guarantees therein meaningful.

II.

EVEN IF THE RIGHT OF THE CITIZEN TO MAINTAIN HIS OR HER REPUTATION IS NOT A BASIC CONSTITUTIONAL RIGHT OF A FUNDAMENTAL NATURE, NEVERTHELESS, IN SUCH INSTANCE, SUCH RIGHT CANNOT BE INFRINGED UPON BY STATE ACTION WITHOUT MEETING PROCEDURAL DUE PROCESS SAFEGUARDS, PARTICULARLY WHERE, AS HERE, SAID RIGHT IS COUPLED WITH THE RIGHT TO RECEIVE AND USE ALCOHOLIC BEVERAGES.

Appellee's alternative position is two fold: first, that the statutes, by providing no provision for notice of the intended action by the persons authorized to act by statute with stated reasons

or basis of the proposed action and by making no provision for a hearing on the merits of the same, violate the procedural due process requirements of the 14th amendment by their resulting operational effect in the denial of the citizen's right to use and receive alcoholic beverages and, secondly, even if the citizen has no fundamental, constitutionally protected right to maintain her reputation free from state infringement, nevertheless, such right, when coupled and so inextricably intertwined with the right to use and receive alcoholic beverages, as said rights are so closely related in the objected to statutes, such dual rights cannot be infringed upon by the State without procedural due process safeguards.

The statutes herein involved grant the power to control specified activities of certain citizens in relation to the use and receipt by said citizens of alcoholic beverages under the threat of criminal sanctions, so as to result in the withholding of said beverages from the citizens whose conduct is sought to be regulated, and whose freedom, resultingly, is restricted. Wisconsin Statutes Vol. I, secs. 176.26 and 176.28. The power to so limit the liberty of the citizen has the single guideline of applicability to citizens whose estate is lessened or wasted by drinking, and the power to limit such liberty is granted to legislative bodies (town supervisors, village trustees), administrative officials (mayor, county superintendent of the poor, chairman of the county board, district attorney), ministerial officers (chief of police) and citizens without any authority of official capacity (wife). Although in the instant case it was a ministerial officer who, without notice of the action and stated reasons for him to do so, and without

a hearing, acted to limit appellee's liberty with respect to her use and receipt of alcoholic beverages for one year, the Supreme Court may consider all possible applications of the statute in other factual situations besides that at bar. N.A.A.C.P. v. Buttons (1963), 371 U.S. 415, 432, 83 S. Ct. 328, 337, 9 L. ed 2d 405, 418. In the case of a ministerial officer it has been held that when such an officer is granted, by legislative act, the power to interfere with certain rights of citizens, such act is void, State v. Bulot, (1932), 175 La. 21, 142 S. 787 (holding it to be a judicial function to determine if an assembly is peaceable or unlawful and an act granting unto police officers the power to do so being void).

The right under consideration at this point is the right to receive and use a particular type of personal property, alcoholic beverages. Appellee makes no contention that the State cannot restrict a citizen's use of alcoholic beverages or terminate the same, as said right has no constitutional source that would prohibit state action to that effect; nevertheless, appellee asserts, such action on behalf of the state can only be done in a manner consistent with procedural due process, Joint Anti-Facist Refugee Committee v. McGrath (1950), 341 U.S. 123, 71 S. Ct. 624, 95 L. ed2d 817, and in a manner that does not unnecessarily destroy protected freedoms at the same time. Griswold v. Connecticutt (1965), 381 U.S. 479, 85 S. Ct. 1678, 14 L. ed 2d 510; Shelton v. Tucker (1960), 364 U.S. 479, 488, 81 S. Ct. 247, 5 L. ed 2d 231; Louisiana v. N.A.A.C.P. (1961), 366 U.S. 293, 81 S. Ct. 1333, 6 L. ed 2d 301. The apparent desire of the objected to statutes herein, namely, to keep low income families off public

welfare by restricting their right to the use of alcoholic beverages could be accomplished by the traditional enforcement of the Wisconsin criminal laws enforcing non support and drunkeness. See Wisconsin Statutes Vol. I secs. 52.05 and 52.055 and Vol. II, sec. 947.03. As was stated in the majority opinion in Griswold, supra,:

> "It concerns a law which. . . seeks to achieve its goals by means having a maximum destructive effect upon that relationship. Such a law cannot stand in the light of the familiar principle so often applied by this Court that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

Enforcement of the criminal laws of Wisconsin, aforementioned, provides a judicial forum for the testing of the truth or falsity of the charges brought against the person whose conduct is objected to, with the attenuating protection of confrontation and cross examination, and if a finding of guilt were warranted there under, provides for a range of penalties commensurate with the wrong done, unlike the objected to statutes herein whose sanction is a discretionless one year restriction. The writ of certiorari, urged by the State as a means of redressing this wrong, is inapplicable in a situation involving a ministerial officer, since in Wisconsin such writ is only to review administrative and legislative board action. See Wisconsin Statutes Vol. II, Sec. 252.04, Lakeshore Development Commission v. Planning Commission (1961), 12 Wis 2d 560, 107 N.W. 2d 590.

A series of cases evolving around Cafeteria and Restaurant Workers v. McElroy (1961), 367 U.S. 886, 81 S. Ct. 1743, 6 L. ed 2d 1230 lend themselves to the proposition that in certain instances a hearing and notice thereof with the rights of confrontation and cross examination not being necessary. An examination of this case, however, indicates that they deal in limited areas, e.g. the privilege of government employment wherein the employee has no other interest than the employment itself, Cafeteria Workers, supra; Chafin v. Pratt (1966 5 C.A.), 358 F2d 349, cert. den. 385 U.S. 878, 87 S. Ct. 159, 17 L. ed 2d 105; Sessions v. State of Connecticutt (1968), 293 F. Supp. 834; where the one denied the hearing was not adversely affected in a legal right: Fugazy Travel Bureau Inc. v. C.A.B. (C.A.D.C. 1965), 350 F2d 733 (holding money and remitting it once a month under government regulation seen as a mere privilege only); Law Motor Freight Inc. v. C.A.B. (1967), 364 F2d 139, cert. den. 387 U.S. 905, 87 S. Ct. 1683 , 18 L. ed. 2d 622 and Continental Bank v. National City Bank (E.D. Ohio 1965), 245 F. Supp 684 (private interest involved was merely to be free from competition); Lawton v. Steele (1894), 152 U.S. 133, 14 S. Ct. 499, 38 L. ed. 385 (seizure and destruction of illegal devices where not duly oppressive to individuals); Hosack v. Smiley (D.C. Cal. 1967), 276 F. Supp. 876, (where there is no factual question in issue that hearing could serve to resolve). As was stated by Justice Frankfurter in Joint Anti-Facist Refugee Committee v. McGrath, (1950), 341 U.S. 123, 71 S. Ct. 624 95 L. ed. 817, (p. 172):

> "Summary administrative procedures may be sanctioned by history or obvious necessity.

But these are so rare as to be isolated in-instances . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss, notice of the case against him and opportunity to meet it. Nor has a better way been found generating that feeling, so important to popular government, that justice has been done.

The strength and significance of these considerations-considerations which go to the very ethos of the scheme of our society-give a ready answer to the problem before us. That a hearing has been thought indispensible in so many other situations, leaving the cases of denial exceptional, does not itself prove that it must be found essential here. But it does place upon the attorney general the burden of showing weighty reason for departing in this instance from a rule so deeply imbedded in history and in the demands of justice."

In accord: Morgan v. United States (1938), 304 U.S. 1, 58 S. Ct 773, 82 L. ed 129 Sniadach v. Family Finance Corp., (1969), 395 U.S. 337, 89 S. Ct. 1820, 23 L.ed2d 349; Opp Cotton Mills v. Administrator (1941), 312 U.S. 126, 61 S. Ct. 524, 85 L.ed 624; St. Joseph's Stockyards v. United States (1936), 298 U.S. 38, 56 S. Ct. 720, 80 L.ed 1033; Dixon v. Alabama State Board of Education (1961 5th Cir.), 294 F2d 150; Ohio Bell Telephone Co. v. Public Utilities Commission (1937), 301 U.S. 292, 57 S. Ct. 724, 81 L.ed. 1093; Armstrong v. Manzo (1965), 380 U.S. 545, 85 S. Ct. 1187, 14 L.ed2d 62; Willner v. Committee on Character (1963), 373 U.S. 96, 83 S. Ct. 1175, 10 L.ed2d 224.

The difference between the above cited rule of Joint Anti Facist and the exception to the rule of Cafeteria and its satellite cases is clear. The gist of the difference is that in the instant case no privilege is involved but rather a right is at stake,

the right being the right to receive and use alcoholic beverages coupled with, as is pointed out later, the right to maintain one's reputation free from ~~from~~ state infringement without procedural due process safeguards. Although the right to receive and use alcoholic beverages is not a constitutional right to receive and use alcohol beverages is not a constitutional right, it does vest in every free adult citizen of the state and as such differs from the privilege of selling alcoholic beverages, as was the situation in Crane v. Campbell(1917), 245 U.S. 304, 38 S. Ct. 62 L.ed. 304 and from the right of possessing liquor in the form of contraband, as was similiarly the situation in Samuels v. McCurdy(1924), 267 U.S. 188, 45 S. Ct. 264, 69 L.ed. 568, two prohibition era cases relied on heavily by the State in its brief, in support of its proposal that the State has an almost unlimited power in the area of alcoholic beverages. The right to receive and use alcoholic beverages is not, as in the case of government employment, a mere privilege subject to the plenary power of the executive, Cafeteria, supra, as no special relation exists between the state and citizen other than governor-governed, the question of a smooth operation of the government's internal affairs being absent. Accordingly, it is submitted that the facts at bar fit the rule rather than the Cafeteria exception. True, the right-privilege distinction has become clouded (See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439(1968), but the lessening of the distinction has served to merge the area of privilege into the constitutional protection of procedural due process that only rights formerly enjoyed. In Sherbert v. Verner(1963), 374 U.S. 398, 83 S. Ct. 1790, 10 L.ed2d 960, a citizen lost her unemployment compensation for refusing to accept Saturday work on account of religious

beliefs. The Supreme Court overruled the contention that such compensation was a privilege and stated:

> "Nor may the Courth Carolina Court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right", but merely a "privilege". It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

It may be further seen that the alternative position of Appellee, assumed in the event the Court rules that the right of a citizen to maintain his reputation is not constitutionally protected against State action as a fundamental right is, that the dual rights herein at stake may not be limited, revoked or terminated with the resulting harm done to the citizen without procedural due process protection. Appellant seems to base its position upon the fact that its interest in the control of alcoholic beverages far outweighs the interest of its citizens in obtaining alcoholic beverages so that under the Cafeteria rule of balancing interests no notice or hearing is needed. Appellee asserts that were only the right to receive and use alcoholic beverages at stake, then the argument of the state under said test would merely cause a lesser overbalance towards the side of the citizen than is the situation in the instant case where the additional and dual right of the citizen to maintain her reputation is at stake. The individual's interest herein is salutory: his image in society among his friends, relatives, neighbors, before his peers and his employers and in his own mind is involved, and when such dual right is coupled with the lesser right of obtaining alcoholic beverages, the clear prepon-

derance of the weight under the Cafeteria balance test swings to the side of the citizen. The interest of the state is merely to keep low income persons off public assistance, and with the millions on public assistance from a multitude of reasons, Goldberg v. Kelly(1970) 38 U.S. Law Week 4223, including disability, death and abandonment of the breadwinner, unmarried mothers, the aged etc., these few receiving assistance due to excessive drinking of the breadwinner causes the state's interest to be miniscule. On the other hand, the precious nature of reputation and the "badge of shame" attaching to infringements upon the same has been given recognition by the Courts, requiring, whenever reputation is affected, the requirement of notice and hearing of the issues, even in the exception-to-the-rule area of government employment. Birnbaum v. Trussell(2nd Cir. 1966), 371 F2d 672; Wiemann v. Updegraff, (1952), 344 U.S. 183, 73 S. Ct. 215, 97 L.ed 216; Slochower v. Board of Education(1956), 350 U.S. 551, 76 S. Ct. 637, 100 L.ed. 692. Consequently, an exception to the rule exists when governmental action causes injury to reputation. This was noted as follows: in Birnbaum, supra, (p. 678):

> ". . . whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist." (Emphasis added).

Although appelle does not assert that the right to use and receive alcoholic beverages is on a higher level than is the privilege of government employment, nevertheless, it follows that if the two were equated the injury to reputation in the instant case

would be equivalent to the substantial interest in the employment cases which requires notice and hearing. The Badge of Shame furthermore, is so intimately connected not only with a person's economic future but also with his personal and social relationships that appelle sees it as being impossible to limit the procedural due process requirements to only situations where economic harm results from damage to reputation, for in all situations, every aspect of a person's life is affected by such damage, and the proposal to limit procedural due process requirements to instances where economic damage alone arises is at odds with reality.

The suggestions that appellee utilize alternative methods of redress against the state action such as issuing a statement to the press (suggested by the State on p. 26 of its brief) or by seeking political recourse against officials doing the posting (suggested by the State on p. 27) are disturbing, as it infers that access to the courts should be defrayed, thus belittling the efficiency of the judicial system and further suggesting that the quiet dignity of the Courts should be deserted in favor of trial by mass media. Such an argument in actuality fits with the theme of the objected to statutes whereby public declarations by third persons without a judicial forum cause a transfer of justiciable questions from the Courts to a more sensational forum, here the barrooms and gossip corners of the community.

III.
CONCLUSION

The issue of injury to reputation was raised by the complaint (App. 102-106) and was properly considered by the Lower Court with the question of procedural due process with which it is inextricably intertwined in the issues of this case, involving the dual rights of appellee, one of which right constitutes the substantial interest of maintaining her reputation uninfringed by State Action, which as appellee primarily submits, in a fundamental, constitutionally protected right which no state may infringe, and which, if the Court deems said right not to be of the fundamental constitutionally protected nature, at least is a right that cannot be infringed by state action without procedural due process safeguards involving notice, hearing and confrontation. As is noted, this right in the instant case is dual with the non-constitutional right of use and receiving alcoholic beverages. To be sure, the Appellant below came prepared at the 3 Judge Court to deal with the question of reputation in that it subpoenaed witnesses who were prepared to testify as to the same (see page 15, appellant's brief), and, although the Court properly refused to allow testimony as to these and other facts (such being a consideration proper only on ~~demand~~ remand from 3 Judge Court to a single judge, Metcalf v. Swank, (D.C. Ill., 1968), 293 F. Supp. 268), it evidences the fact that the issue of injury to reputation was in the minds of the court and counsel, and, as counsel himself infers on page 15 of his brief, it was error not to consider the point of reputation injury further, by the calling of his witnesses. Finally, it is to be noted that when asked by the Court what his position was on the question of reputation, Appellant's counsel did not below claim said issue was not before the Court (Appendix 112-114) and

thus cannot now raise such objection on appeal. Accordingly, it is respectfully submitted that the Statutes in question herein, as utilized against appellee, result in a deprivation and infringement by State action of appellee's fundamental and constitutionally protected right to maintain her reputation free from state action, or, alternatively, that the substantial interest represented by the citizen's right to maintain her reputation cannot, when coupled with her right to use and receive alcoholic beverages, be restricted, removed or otherwise limited without the procedural due process safeguards of notice and hearing, and that the 3 Judge ruling holding the statutes unconstitutional should be sustained.

S.A.SCHAPIRO
MEMBER OF THE BAR
UNITED STATES SUPREME COURT

June, 1970

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WISCONSIN *v.* CONSTANTINEAU

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 95. Argued December 10, 1970—Decided January 19, 1971

The police chief of Hartford, Wisconsin, pursuant to a state statute, caused to be posted a notice in all retail liquor outlets in Hartford that sales or gifts of liquor to appellee, a resident of that city, were forbidden for one year. The statute provides for such "posting," without notice or hearing, with respect to any person who "by excessive drinking" produces certain conditions or exhibits specified traits, such as exposing himself or family "to want" or becoming "dangerous to the peace" of the community. On appellee's suit seeking, *inter alia*, injunctive relief, a three-judge federal court held the statute unconstitutional as violative of procedural due process. *Held:*

1. The label or characterization given an individual by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. Pp. 3–4.

2. Since here the state statute is unambiguous and there is no uncertain issue of state law, the federal court properly proceeded to determine the federal constitutional claim. *Zwickler* v. *Koota*, 389 U. S. 241, 250–251. Pp. 4–6.

302 F. Supp. 861, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which HARLAN, BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN, J., joined. BLACK, J., filed a dissenting opinion, in which BLACKMUN, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 95.—October Term, 1970

State of Wisconsin, Appellant, v. Norma Grace Constantineau. } On Appeal from the United States District Court for the Eastern District of Wisconsin.

[January 19, 1971]

Mr. Justice Douglas delivered the opinion of the Court.

Appellee is an adult resident of Hartford, Wis. She brought suit in a federal district court in Wisconsin to have a Wisconsin statute declared unconstitutional.[1] A three-judge court was convened, 28 U. S. C. § 2281. That court, by a divided vote, held the Act unconstitutional, 302 F. Supp. 861, and we noted probable jurisdiction. 397 U. S. 985.

The Act, § 176.26 Wis. Stat., provides that designated persons may in writing forbid the sale or gift of intoxicating liquors to one who "by excessive drinking" produces described conditions or exhibits specified traits, such as exposing himself or family "to want" or becoming "dangerous to the peace" of the community.[2]

[1] 28 U. S. C. § 1343 (3) provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . . To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[2] Section 176.26 reads as follows:

"(1) When any person shall by excessive drinking of intoxicating liquors, or fermented malt beverages misspend, waste or lessen his estate so as to expose himself or family to want, or the town, city,

The chief of police of Hartford without notice or hearing to appellee caused to be posted a notice in all retail liquor outlets in Hartford that sales or gifts of liquors to appellee were forbidden for one year. Thereupon this suit was brought against the chief of police claiming damages and asking for injunctive relief. The State of

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village or county to which he belongs to liability for the support of himself or family, or so as thereby to injure his health, endanger the loss thereof, or to endanger the personal safety and comfort of his family or any member thereof, or the safety of any other person, or the security of the property of any other person, or when any person shall, on account of the use of intoxicating liquors or fermented malt beverages, become dangerous to the peace of any community, the wife of such person, the supervisors of such town, the mayor, chief of police or aldermen of such city, the trustees of such village, the county superintendent of the poor of such county, the chairman of the county board of supervisors of such county, the district attorney of such county or any of them, may, in writing signed by her, him or them, forbid all persons knowingly to sell or give away to such person any intoxicating liquors or fermented malt beverages, for the space of one year and in like manner may forbid the selling, furnishing, or giving away of any such liquors or fermented malt beverages, knowingly to such person by any person in any town, city or village to which such person may resort for the same. A copy of said writing so signed shall be personally served upon the person so intended to be prohibited from obtaining any such liquor or beverage.

"(2) And the wife of such person, the supervisors of any town, the aldermen of any city, the trustees of any village, the county superintendent of the poor of such county, the mayor of any city, the chairman of the county board of supervisors of such county, the district attorney or sheriff of such county, may, by a notice made and signed as aforesaid, in like manner forbid all persons in such town, city or village, to sell or give away intoxicating liquors or drinks or fermented malt beverages to any person given to the excessive use of such liquors, drinks or beverages, specifying such person, and such notice shall have the same force and effect when such specified person is a nonresident as is herein provided when such specified person is a resident of said town, city or village."

Section 176.28 makes the sale or gift of liquor to such persons a misdemeanor.

Wisconsin intervened as a defendant on the injunctive phase of the case and that was the only issue tried and decided, the three-judge court holding the Act unconstitutional on its face and enjoining its enforcement. The court said:

> "In 'posting' an individual, the particular city official or spouse is doing more than denying him the ability to purchase alcoholic beverages within the city limits. In essence, he is giving notice to the public that he has found the particular individual's behavior to fall within one of the categories enumerated in the statutes. It would be naive not to recognize that such 'posting' or characterization of an individual will expose him to public embarassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State statute can make such a quasi-judicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter." 302 F. Supp., at 864.

We have no doubt as to the power of a State to deal with the evils described in the Act. The police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-first Amendment. *Crane* v. *Campbell*, 245 U. S. 304. The only issue present here is whether the label or characterization given a person by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met.

It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks

much of the difference between rule by law and rule by fiat.

We reviewed in *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895, the nature of the various "private interests" that have fallen on one side or the other of the line. See also *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 339–342. Generalizations are hazardous as some state and federal administrative procedures are summary by reason of necessity or history. Yet certainly where the State attaches "a badge of infamy" to the citizen, due process comes into play. *Wieman* v. *Updegraff*, 344 U. S. 183, 191. ". . . the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Anti-Facist Committee* v. *McGrath*, 341 U. S. 123, 168 (concurring opinion).

Where a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

It is suggested that the three-judge court should have stayed its hand while the aggrieved person repaired to the state courts to obtain a construction of the Act or relief from it. The fact that Wisconsin does not raise the point does not of course mean that it lacks merit. Yet the suggestion is not in keeping with the precedents.

Congress could of course have routed all federal constitutional questions through the state court systems, saving to this Court the final say when it came to review of the state court judgments. But our First Congress [3] resolved differently and created the federal court system and in time granted the federal courts various heads of jurisdiction,[4] which today involve most federal constitutional rights. Once that jurisdiction was granted, the federal courts resolved those questions even when they were enmeshed with state law questions. In 1941 we gave vigor to the so-called abstention doctrine in *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496. In that case an authoritative resolution of a knotty state law question might end the litigation and not give rise to any federal constitutional claim. *Id.*, at 501. We, therefore, directed the District Court to retain the suit pending a determination by a state court of the underlying state law question. We applied the abstention doctrine most recently in *Fornaris* v. *Ridge Tool*, 400 U. S. —, —, where a relatively new Puerto Rican statute, which had not been authoritatively construed by the Commonwealth's courts, "might be judicially confined to a more narrow ambit which would avoid all constitutional questions." We ordered the federal courts to stay their hands until the Puerto Rican courts had spoken. Speaking of *Reetz* v. *Bozanich*, 397 U. S. 82, we noted that the "three judge federal court should not have proceeded to strike down an Alaska law which, if construed by the Alaska Supreme Court, might be so confined as not to have any

[3] The First Judiciary Act is in 1 Stat. 73.

[4] 28 U. S. C. § 1343 (3) involved in the present case came into the statutes in 1871. 17 Stat. 13. In 1875 Congress enlarged federal jurisdiction by authorizing the "federal question" jurisdiction presently contained in 28 U. S. C. § 1331. See 18 Stat. 470. We recently reviewed this history in *Zwickler* v. *Koota*, 389 U. S. 241, 245–248.

constitutional infirmity." *Id.*, at —. But the abstention rule only applies where "the issue of state law is uncertain." *Harman* v. *Forsenius*, 380 U. S. 528, 534. Thus our abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe. *Reetz* v. *Bozanich, supra; City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639.

In the present case the Wisconsin Act does not contain any provision whatsoever for notice and hearing. There is no ambiguity in the state statute. There are no provisions which could fairly be taken to mean that notice and hearing might be given under some circumstances or under some construction but not under others. The Act on its face gives the chief of police the power to do what he did to the appellee. Hence the naked question, uncomplicated by an unresolved state law, is whether that Act on its face is unconstitutional. As we said in *Zwickler* v. *Koota*, 389 U. S. 241, 251, abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal court should not abstain but proceed to decide the federal constitutional claim. *Id.*, at 250–251. We would negate the history of the enlargement of the jurisdiction of the federal district courts,[5] if we held the federal court should stay its hand and not decide the question before the state courts decided it.

Affirmed.

[5] See n. 4, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 95.—October Term, 1970

State of Wisconsin, Appellant, v. Norma Grace Constantineau. } On Appeal from the United States District Court for the Eastern District of Wisconsin.

[January 19, 1971]

Mr. Chief Justice Burger, with whom Mr. Justice Blackmun joins, dissenting.

The Court today strikes down, as unconstitutional, a Wisconsin statute that has never been challenged or tested in the Wisconsin state courts. The judges of Wisconsin probably will be taken by surprise by our summary action since few, if any, have ever heard of this case.

Very likely we reach a correct result since the Wisconsin statute appears, on its face and in its application, to be in conflict with accepted concepts of due process.

The reason for my dissent is that it seems to me a very odd business to strike down a state statute, on the books for 40 years more or less, without any opportunity for the state courts to dispose of the problem either under the Wisconsin Constitution or the U. S. Constitution. For all we know, the state courts would find this statute invalid under the State Constitution,[1] but no one on either side of the case thought to discuss this or exhibit any interest in the subject. Since no one could

[1] Although Wisconsin has no due process clause as such, Article I, § 1, of the Wisconsin Constitution has been held by the Wisconsin Supreme Court to be substantially equivalent to the limitation on state action contained in the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Pauly* v. *Keebler*, 185 N. W. 554, 175 Wis. 428 (1921).

reasonably think that the judges of Wisconsin have less fidelity to due process requirements of the Federal Constitution than we do, this case is, for me, a classic illustration of one in which we should decline to act until resort to state courts has been exhausted. At oral argument counsel for Mrs. Constantineau was candid in saying that he had deliberately avoided resort to the state courts because he could secure, and indeed did secure, a three-judge federal district court to decide the issue and in that posture appeal would lie directly to this Court.

Only recently in the 1969 Term we held unanimously that a challenge, under the Equal Protection Clause of the Fourteenth Amendment and under certain provisions of the Alaskan Constitution, to the constitutionality of a state statute restricting commercial salmon fishing licenses should not have been decided by the federal district court until the courts of Alaska had acted. There, as here, the statute's challenger wanted to use the "short-cut" Congress has authorized. As here, the "short-cut" was to convene a three-judge federal district court which held the Alaska statute invalid. Notwithstanding that the license applicants presented a sound claim, MR. JUSTICE DOUGLAS, speaking for a unanimous Court, said:

> "We are advised that the provisions of the Alaska Constitution at issue have never been interpreted by an Alaska court. The District Court, feeling sure of its grounds on the merits, held, however, that this was not a proper case for abstention, saying that 'if the question had been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable.' 297 F. Supp., at 304. The three-judge panel was a distinguished one, two being former Alaska lawyers. And they felt that prompt decision was necessary to

avoid the 'grave and irreparable' injury to the 'economic livelihood' of the appellees which would result, if they could not engage in their occupation 'during this year's forthcoming fishing seasons.' *Ibid.*

"It is, of course, true that abstention is not necessary whenever a federal court is faced with a question of local law, the classic case being *Meredith* v. *Winter Haven,* 320 U. S. 228, where federal jurisdiction was based on diversity only. Abstention certainly involved duplication of effort and expense and an attendant delay. See *England* v. *Louisiana State Board,* 375 U. S. 411. That is why we have said that this judicially created rule which stems from *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496, should be applied only where 'the issue of state law is uncertain.' *Harman* v. *Forssenius,* 380 U. S. 528, 534." *Reetz* v. *Bozanich,* 397 U. S. 82, 86 (1970).

This very wise doctrine is an essential one of policy and is a keystone of federalism. Previously this Court had underscored this concept, saying:

"Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. . . . In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily." *City of Meridian* v. *Southern Bell Tel. & Tel. Co.,* 358 U. S. 639, 640–641 (1959); see also *Fornaris* v. *Ridge Tool Co.,* — U. S. — (1970).

It is no answer to contend that there is no ambiguity in the Wisconsin statute and hence no need to abstain; in *Reetz* the Alaska statute could not have been more plain, or less susceptible to a limiting construction. Yet, in furtherance of this Court's firm policy to steer around head-on collisions with the States by avoiding unnecessary constitutional decisions, we reversed the District Court and remanded with instructions to stay its hand while the litigants exhausted state court remedies for resolution of their challenge to the statute. See also *Fornaris* v. *Ridge Tool Co.*, — U. S. — (1970). *Reetz* cannot be distinguished and I see no reason to depart from the principles it reaffirmed.[2]

I quite agree that there is no absolute duty to abstain—to stay our hand—until the state courts have at least been asked to construe their own statute, but for me, it is the negation of sound judicial administration—and an unwarranted use of a limited judicial resource—to impose this kind of case on a three-judge federal district court, and then by direct appeal, on this Court. Indeed, in my view, a three-judge district court would be well advised in cases such as this, involving no urgency or question of large import, to decline to act.

This Court has an abundance of important work to do, which, if it is to be done well, should not be subject to the added pressures of non-urgent state cases which the state courts have never been called on to resolve. Neither the historic role of this Court nor any reasonable duty placed on us, calls for our direct intervention when no reason for expedited review is shown. Here we have

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[2] Here there is not the urgency presented by *Reetz* where our action in remanding for state court consideration effectively precluded Bozanich from securing a commercial fishing license for at least one more season. No such urgency is presented by the instant case.

an example of an unwise statute making direct review *prima facie* available, and an unwillingness by the Court to follow its own precedents by declining to pass on the Wisconsin statute before Wisconsin does so. We should remand this case with directions to the three-judge court to refrain from acting until the Wisconsin courts have acted.